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THE ELASTIC MEANING(S) OF HUMAN TRAFFICKING

Boston University School of Law
Public Law & Legal Theory Paper No. 20-1

April 2020

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Appearing in CALIFORNIA LAW REVIEW 108:100 (2020)

The Elastic Meaning(s) of Human Trafficking

Julie Dahlstrom*

What is human trafficking? When is an expansive definition of trafficking justifiable? How does trafficking relate to other concepts—like domestic violence, sexual assault, labor exploitation, and prostitution—with which it often overlaps? These questions have become increasingly salient after the U.S. Congress defined the crime of human trafficking in the Victims of Trafficking and Violence Protection Act of 2000 (“TVPA”). Since then, all fifty states have passed legislation with varying definitions of the crime. Congress also has re-entered the field with subsequent legislation, expanding the crime to capture new conduct.

As a result of legislative advocacy and judicial interpretation, the legal definition of human trafficking in the United States has now broadened to include a remarkably wide variety of actors and conduct. This is particularly evident in the context of sex trafficking. Buyers of sex, online platforms, and hotels increasingly have been caught in the anti-trafficking crosshairs and targeted with increased criminal and civil liability. In addition, prosecutors, plaintiffs, and legislators have reframed new conduct as trafficking. In some states, for example, almost all commercial sex is now sex trafficking. In other contexts, previously discrete gender-based crimes, such as domestic violence and sexual assault, are categorized as trafficking.

DOI: <https://doi.org/10.15779/Z38T727G6S>

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* Clinical Associate Professor and Director of the Immigrants’ Rights and Human Trafficking Program, Boston University School of Law. I am particularly grateful for the thoughtful comments provided by Roni Amit, Sabrineh Ardalan, Jacqueline Bhabha, Warren Binford, Luis CdeBaca, Jennifer Chacón, Danielle Citron, Tanya Cooper, Pooja Dadhanian, Kasandra Dodd, Claire Donahue, Mary Holper, Daniel Kanstroom, Jennifer Koh, Peggy Maisel, Linda McClain, Karen Pita Loor, David Rossman, Faraz Sanei, David Seipp, Andrea Seielstad, Rachel Settlege, Katherine Silbaugh, Anita Sinha, and Paul Tremblay on drafts of this Article. I have greatly benefited from feedback at writing workshops at the Association of American Law Schools Clinical Conference, Boston University School of Law, the Clinical Law Review Writers’ Workshop at New York University School of Law, and the International Society for the Reform of Criminal Law Conference. Special thanks to Brian Flaherty, Evan Bailey, Betsy Byra, Hannah Levin, Yuliya Levertova, and Meghan Poole for their excellent research assistance.

This Article examines the historical and continuing expansion of trafficking definitions in the United States with a particular focus on sex trafficking. It posits that the broadening trafficking framework offers solutions to intractable problems that have bedeviled prosecutors and victim-rights advocates since 2000. However, the expansion also poses risks of its own to the rights of victims, defendants, and the continued viability of the trafficking framework. This Article argues that the next wave of reform should involve selective broadening and pruning. It cautions against an overly ambitious future expansion, arguing that it risks endangering the strength and legitimacy of the trafficking concept itself.

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INTRODUCTION

At a press conference in Seattle, Washington, in 2016, a King County prosecutor described how privileged men—some of whom were high-level Amazon and Microsoft employees—formed a club for buying sex called “The League of Extraordinary Gentlemen.”¹ Using rather salacious imagery, the prosecutor described how members of “The League” purchased sex, met regularly, and even organized an online review board,² where they posted Yelp-like reviews about the women.³

The prosecutor made clear these men should not be viewed as mere customers.⁴ Rather, they should be viewed as an essential—and insidious—component of the women’s “abuse[] and commercial rape[.]”⁵ “Because they had money,” he said, these men “gained access to sexually abuse these vulnerable young women, then put their energies toward a campaign to encourage many more men to do the same.”⁶ He pointedly asserted that, “*This* is what human trafficking looks like.”⁷

1. See First Amended Complaint at 8, *Emmanuel v. King County*, 2018 U.S. Dist. LEXIS 112786 (W.D. Wash. July 6, 2018) (No. 2:18-cv-00377-JLR); Sasha Aslanian, *Battle Against Sex Trafficking Turns to Prostitution Review Sites*, MARKETPLACE (Sept. 16, 2016), <https://www.marketplace.org/2016/09/16/battle-against-sex-trafficking-turns-prostitution-review-sites> [<https://perma.cc/Y2DJ-7JCT>] (describing the use of review boards to promote the trafficking of Korean women in Seattle); Nina Burleigh, *Tech Bros Bought Sex Trafficking Victims by Using Amazon and Microsoft Work Emails*, NEWSWEEK (Dec. 21, 2017), <https://www.newsweek.com/metoo-microsoft-amazon-trafficking-prostitution-sex-silicon-valley-755611> [<https://perma.cc/E3KZ-7HZD>]; Juju Chang & Jackie Jesko, *Inside the Fight to Take Down Online Prostitution Review Boards*, ABC NEWS (June 27, 2017), <https://abcnews.go.com/US/inside-fight-online-prostitution-review-boards/story?id=48308991> [<https://perma.cc/AEN2-3ZQF>] (noting that review websites in Seattle, Washington, have users who are “prominent tech executives, including an Amazon software developer and a high-level Microsoft director”).

2. Members of “The League” maintained a website called “The Review Board,” an online forum boasting 23,000 members who posted online reviews and engaged in a discussion forum for buyers of sex. See Lynn Thompson, *BUSTED: How Police Brought Down a Tech-Savvy Prostitution Network in Bellevue*, SEATTLE TIMES (July 26, 2017), <https://www.seattletimes.com/seattle-news/times-watchdog/busted-how-police-brought-down-a-tech-savvy-prostitution-network-in-bellevue> [<https://perma.cc/U6GJ-XBL3>]. According to King County prosecutor Dan Satterberg, there are more than 100 websites that facilitate commercial sex in King County alone. See John O’Brien, *The State of Sex Trafficking in King County*, KUOW (Feb. 5, 2015), <https://kuow.org/stories/state-sex-trafficking-king-county> [<https://perma.cc/5VYX-5793>].

3. See Certification for Determination of Probable Cause at 3, *Washington v. Yoon*, No. 16-9-17342-5 (Super. Ct. 2016); see also First Amended Complaint, *Emmanuel*, *supra* note 1, at 8.

4. See First Amended Complaint, *Emmanuel*, *supra* note 1, at 12.

5. See *id.* at 11.

6. *Id.* at 12.

7. *Id.* (emphasis added) (quoting Peter Satterberg who stated, “They were victims. They were trafficked. They were abused and commercially raped by men here in King County. That’s what this case is about. And that’s what is fueling us. Because this is an international human trafficking ring. It’s right here in King County, Washington. And we’re offended by it.” (emphasis omitted)); see also Elizabeth Nolan Brown, *The Truth About the Biggest U.S. Sex Trafficking Story of the Year*, REASON (Sept. 9, 2016), <https://reason.com/2016/09/09/the-truth-about-us-sex-trafficking> [<https://perma.cc/6PA7-WBL7>] (describing how Washington officials “unveiled a perfect storm of . . . horrors” but that the reality was “far less lurid and depraved”).

But is this really what human trafficking “looks like”? And what is at stake in the answer to this question? Criminal court documents in the King County case failed to allege any “force, fraud, or coercion”—the traditional cornerstones of the federal human trafficking crime in the United States.⁸ There was no “pimp” or third party controlling the women.⁹

Unsurprisingly, the defendants strongly resisted being characterized as perpetrators of sex trafficking.¹⁰ Indeed, in a federal civil defamation suit brought against the Sheriff’s Office and King County Prosecuting Attorney’s Office, the criminal defendants argued that prosecutors sought to “vilify and humiliate [them] and to characterize their arrests as something that they are not.”¹¹

This case is emblematic of a larger, continuing struggle to redefine and expand the contours of human trafficking through rhetoric, policy, and law in the United States.¹² Human trafficking, as a legal matter, has gone far beyond early,

8. See First Amended Complaint, *Emmanuel*, *supra* note 1, at 7. Definitions of human trafficking vary under international, federal, and state law. See *infra* Part I.A and I.B. The U.S. Congress defined a victim of a “severe form of trafficking” to include “force, fraud, or coercion,” unless the victim is under eighteen years of age. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, 115 Stat. 1464 (2000) (codified at 18 U.S.C. §§ 1581–95 (2018)). For a detailed discussion of the definition of trafficking crimes under U.S. federal law, see *infra* Part I.B. Many state statutes mirror the federal requirements of “force, fraud, or coercion,” while others depart significantly from these requirements. See *infra* Part II.C.1 for a discussion regarding state definitions of human trafficking.

9. See *infra* note 120 regarding use of the term “pimp.”

10. This Article will refer to individuals who are accused of trafficking offenses as “perpetrators of trafficking” rather than “traffickers,” unless referencing a direct quotation from another source. It has been widely recognized that status-nouns, equating persons with criminal conduct, are pejorative and deeply problematic. See, e.g., Anita Bernstein, *Working Sex Words*, 24 MICH. J. GENDER & L. 221, 228–31 (2017) [hereinafter Bernstein, *Working Sex Words*] (describing the decline of “status-nouns,” noting that “[s]tatus-nouns carrying negative connotations are on the decline in the law”). Status-nouns essentialize the person with a particular crime, ignoring the factors that may propel the individual to commit the crime as well as the possibility of rehabilitation. This idea has been explored extensively by scholars regarding the use of the term “prostitute” to refer to those involved in commercial sex as well as “illegal” to refer to certain noncitizens. See, e.g., *id.*; Stephen Hiltner, *Illegal, Undocumented, Unauthorized: The Terms of Immigration Reporting*, N.Y. TIMES (Mar. 10, 2017), <https://www.nytimes.com/2017/03/10/insider/illegal-undocumented-unauthorized-the-terms-of-immigration-reporting.html> [<https://perma.cc/FFP5-Q667>] (describing different terminology that may be used in the immigration debate and noting that “[o]ff the table entirely [is] ‘illegal,’ when used as a noun”). For this reason, this Article avoids use of such terms.

11. On March 12, 2018, the criminal defendants filed a federal civil lawsuit in the Western District of Washington against the King County Sheriff’s Office, the King County Sheriff, and the King County Prosecuting Attorney’s Office. See *generally* Complaint, *Emmanuel v. King County*, 2018 U.S. Dist. LEXIS 112786 (W. D. Wash. 2018) (No. 2:18-cv-00377-JLR). The complaint alleges that named parties engaged in abuse of process under Section 1983, a violation of due process under Section 1983, defamation, invasion of privacy, and the intentional and negligent infliction of emotional distress. See *id.* The criminal defendants were not charged with trafficking in the state criminal case because, according to prosecutors, “[t]rafficking requires some sort of coercive behavior, usually physical coercive behavior” under Washington State law, and while they “looked hard” to find such facts, “it did not meet the standard.” Defendant’s Motion to Disqualify the King County Prosecutor’s Office and Dismiss the Criminal Complaint, *Washington v. Peters*, No. 16-C-00154-4 SEA (Wash. Super. Ct. Jan. 9, 2018).

12. See *generally* Janie Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT’L L. 610 (2014) [hereinafter Chuang, *Exploitation Creep*]. The King County case

simplistic notions of victims and “rescue.”¹³ Although when trafficking emerged in the early twentieth century it was associated with “white slavery”—a quite limited concept regarding forced prostitution of Eastern European women—international and domestic law has since evolved to define trafficking with a broader focus.¹⁴ This wider lens has allowed government actors and private parties to envision trafficking in more expansive, and at times conflicting, ways.

Now, trafficking cases throughout the United States—and indeed around the world—are surprisingly diverse. While definitions differ under state and federal law, human trafficking in the United States may encompass a surprising array of scenarios, including:

- an employer who pressures a migrant worker to work using threats of deportation;¹⁵
- an adult who encourages a homeless child to sell sex to survive;¹⁶
- a motel owner who knowingly rents rooms to a perpetrator of sex trafficking;¹⁷
- a psychiatrist who knowingly provides prescription medication to a perpetrator of trafficking used to subdue a victim¹⁸ of sex

is an example of expansive trafficking rhetoric, whereas other cases described *infra* at Part II.A address the broadening definition of trafficking through legislation and judicial interpretation.

13. Scholars have argued that one-dimensional narratives of human trafficking abound with stories of law enforcement seeking to “rescue” victims “chained to a bed in a brothel.” See, e.g., Dina Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 337 (2007). Others have criticized the discourse about victimhood and rescue because it portrays trafficking as an event that can be easily solved in one heroic moment rather than as “the product of the disparities of wealth created by globalization, gendered labor markets, or inadequate migration frameworks.” See, e.g., Janie Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1702 (2010) [hereinafter Chuang, *Rescuing Trafficking*].

14. See *infra* note 44.

15. See, e.g., *United States v. Dann*, 652 F.3d 1160, 1172 (9th Cir. 2011) (“That threat alone—to be forced to leave the country—could constitute serious harm to an immigrant who came to the United States in part to study English and who dreamed of starting a business.”); *United States v. Djoumessi*, 538 F.3d 547, 552 (6th Cir. 2008) (noting that the defendant’s threats to send victim back to Cameroon were coercive in light of the victim’s special vulnerability as an undocumented immigrant and thus may amount to forced labor).

16. Under federal law, “force, fraud, or coercion” is not required if the victim is under eighteen years of age. See 18 U.S.C. § 1591 (2018); see, e.g., Government’s Trial Brief, *United States v. Bonds*, No. 2:14-cr-00074 (W.D. Wash. Mar. 12, 2014) (describing how the defendant “met a fifteen-year-old runaway . . . in Kent, Washington, and recruited her to engage in prostitution”).

17. See *Ricchio v. McLean*, 853 F.3d 553 (1st Cir. 2017) (finding that a motel owner may be held civilly liable if he “knowingly benefited” from trafficking under federal law). Texas and Pennsylvania have adopted state legislation allowing civil lawsuits against hotels, and more than two state civil lawsuits have been filed. See *infra* Part II.B.3 for a detailed discussion regarding civil liability of hotel or motel operators.

18. Some scholars have criticized the term “victim,” as it denotes passivity, fragility, and vulnerability, and prefer to use the term, “survivor.” See, e.g., Chuang, *Rescuing Trafficking*, *supra* note 13, at 1711. For the purpose of this Article, the term “victim” is used in place of “survivor” because it

trafficking;¹⁹ and

- an abusive husband who coerces his spouse to work.²⁰

Many anti-trafficking advocates have viewed the expansion of human trafficking law as a welcome development²¹ that recognizes the complex, contemporary nature of the crime in applying the concept to more subtle, nuanced forms of exploitation.²² However, others have strenuously opposed this expansion, arguing that the trafficking definition was never intended to reach such myriad harms.²³

It is true that a broadened framework has the potential to address long-standing challenges that have plagued prosecutors and victim-rights attorneys for decades.²⁴ Since 2000, scholars and activists have criticized human trafficking law for lagging dramatically behind the changing nature of the crime.²⁵ As sex trafficking has increasingly moved online and behind closed doors, investigators and prosecutors have lacked the legal and investigative tools

has a particular legal significance in federal and state criminal law. The term “victim of trafficking” in this Article refers to a “victim of a severe form of human trafficking” under federal law, defined at 22 U.S.C. § 7102(13) (2018), unless otherwise specified. This Article uses feminine pronouns to refer to victims for the sake of simplicity, but perpetrators of trafficking may be cisgender men, cisgender women, LGBTQI, or gender-nonconforming individuals.

19. See Judgment at 2, *Doe v. Dabbagh*, No. 2:15-cv-10724 (E.D. Mich. Feb. 26, 2015) (awarding compensatory and punitive damages to the Plaintiff); Complaint at 1, *Doe v. Dabbagh*, No. 2:15-cv-10724 (E.D. Mich. Feb. 26, 2015) (alleging that a psychiatrist was civilly liable under the TVPA for providing a perpetrator of trafficking with prescriptions for psychotropic medications “used to drug Plaintiff and facilitate his ability to traffic her”).

20. See generally *Stein v. World-Wide Plumbing, Inc.*, 71 F. Supp. 3d 320 (E.D.N.Y. 2014) (No. 1:13-cv-6795) (allowing the plaintiff’s federal forced labor claims to survive a motion to dismiss when the plaintiff, a victim of domestic violence and sexual assault by her husband, was forced by him to work for his illegal fencing company and at his restaurants); HUMAN TRAFFICKING LEGAL CTR., HUMAN TRAFFICKING AND DOMESTIC VIOLENCE FACT SHEET (Feb. 27, 2018) [hereinafter HUMAN TRAFFICKING FACT SHEET], <https://www.htlegalcenter.org/wp-content/uploads/Human-Trafficking-and-Domestic-Violence-Fact-Sheet.pdf> [https://perma.cc/P4T6-4FL9] (citing to Complaint, *Doe v. Faraghala*, No. 2013-1-CV-238958 (Cal. Super. Ct., Jan. 14, 2013)); *infra* Part II.C.2.

21. See *infra* Part II.A.

22. Even fervent critics of the expansion have recognized some of its benefits. See, e.g., Chuang, *Exploitation Creep*, *supra* note 12, at 629 (“The creep toward slavery is thus rationalized as the strategic deployment of crucial and rare political will in the service of trafficked and forced laborers who have long suffered from inadequate protections under the law.”).

23. Chuang, *Exploitation Creep*, *supra* note 12, at 611; see Aziza Ahmed, “Exploitation Creep” and Development: A Response to Janie Chuang, 108 AM. J. INT’L. L. UNBOUND 268 (2015); Clifford Bob, *Re-framing Exploitation Creep to Fight Human Trafficking: A Response to Janie Chuang*, 108 AM. J. INT’L. L. UNBOUND 264 (2015). See *infra* Part II.A for a more detailed explanation of “exploitation creep.”

24. This Article refers to “victim-rights attorneys” broadly to encompass any attorney who represents victims of trafficking. This spans areas of law, including civil law, criminal law, employment law, family law, immigration law, public benefits law, and tax law, among others.

25. See, e.g., Ann Wagner & Rachel McCann, *Prostitutes or Prey? The Evolution of Congressional Intent in Combating Sex Trafficking*, 54 HARV. J. LEGIS. 17, 53–60 (2017) (detailing the myriad problems with implementation of the TVPA, ranging from low prosecution rates, insufficient victim identification, and inadequate protections for victims).

to confront the crime and protect victims effectively.²⁶ Furthermore, prosecutors have found it challenging to secure victim cooperation, making it difficult to prosecute perpetrators of trafficking.²⁷ Similarly, attorneys in civil cases often have struggled to secure important protections for victims.²⁸

Broadening the definitional framework has offered a potential solution to these challenges and the opportunity to usher in justice for a wider range of victims.²⁹ For example, when the Massachusetts legislature passed trafficking legislation with a broad definition of sex trafficking that no longer required prosecutors to prove “force, fraud, or coercion,” this transformed almost anyone involved in commercial sex into a potential victim. Many supported this expansion. They were certain it would increase access to benefits, including immigration relief, victim compensation, criminal restitution, and civil damages.³⁰ And, indeed, it has. Undocumented victims have obtained essential immigration protections as the state’s human trafficking crime has expanded to include them.³¹ A wider range of individuals has become eligible for victim compensation, criminal restitution, and civil damages.³² Also, these

26. See, e.g., Mary Graw Leary, *Fighting Fire with Fire: Technology in Child Sex Trafficking*, 21 DUKE J. GENDER L. & POL’Y 289, 291 (2014) (“The migration of sex trafficking to a digital space . . . present[s] challenges for accurate identification and assessment of the nature and frequency of child sex trafficking.”).

27. See *infra* Part III.A.

28. See, e.g., Jennifer Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2978–79 (2006) [hereinafter Chacón, *Misery and Myopia*] (describing how commentators have found that the TVPA “emphasizes the law enforcement components of anti-trafficking initiatives in a way that undercuts the Act’s humanitarian goals of assisting trafficking victims”); Charles Song & Suzy Lee, *Between a Sharp Rock and a Very Hard Place: The Trafficking Victims Protection Act and the Unintended Consequences of the Law Enforcement Requirement*, 1 INTERCULTURAL HUM. RTS. L. REV. 133, 149–50 (2006) (arguing that the requirement that immigrant victims must comply with a reasonable request from law enforcement to obtain a T visa fails to adequately protect trafficking victims).

29. See *infra* Part III.A.

30. See MASS. GEN. LAWS ch. 265, § 50(a) (2019) (defining the crime of trafficking in persons for sexual servitude as involving: “[w]hoever knowingly . . . subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person to engage in commercial sexual activity”). See *infra* Part II.C.1 for a greater discussion of the Massachusetts anti-trafficking statute.

31. See *infra* Part III.B.

32. See *id.* Massachusetts anti-trafficking law transformed a wide range of conduct into the crime of trafficking in persons for sexual servitude. This shift allowed new individuals to qualify as victims under the law, thus allowing them to become eligible for victim compensation and criminal restitution. State victim compensation is available to victims of violent crime, including human trafficking, who meet certain requirements, and such compensation covers certain expenses related to the crime, including but not limited to: medical and dental expenses, counseling expenses, funeral/burial costs, lost wages, and loss of financial support. See MASS. GEN. LAWS ch. 258C, § 1–3; *Applying for Victims of Violent Crime Assistance*, OFF. ATT’Y GEN., <https://www.mass.gov/service-details/applying-for-victims-of-violent-crime-assistance> [<https://perma.cc/S2RC-ZD5R>]. Criminal restitution is compensation paid by a perpetrator of crime for the victim’s financial losses. See MASS. OFFICE FOR VICTIM ASSISTANCE & THE VICTIM WITNESS ASSISTANCE BOARD, *IN THE AFTERMATH OF CRIME: A GUIDE TO VICTIM RIGHTS AND SERVICES IN MASSACHUSETTS* 85 (2016) <https://www.mass.gov/files/documents/2016/08/un/aftermath-of-crime.pdf> [[Electronic copy available at: <https://ssrn.com/abstract=3500100>](https://perma.cc/HG8W-</p></div><div data-bbox=)

individuals—now transformed into “victims” under state law—have become eligible to vacate certain criminal dispositions.³³

Yet, amidst these significant victories, a considerable set of challenges has emerged, including continued constitutional claims by defendants, expanding criminal liability for a range of parties, including victims, and other trends that raise profound questions about the continued viability of the expansive trafficking framework.³⁴ Important questions emerge: Can one definitional framework effectively confront such varied harms? At what point do the risks of such an expansive framework outweigh the benefits?

This Article responds by sketching out recent examples of expansion in the sex trafficking context and suggesting a principled framework to govern future efforts to refine the definition in the United States. Part I of this Article explores the evolution of human trafficking under international and United States law.³⁵

JTZZ]. While not mandatory in trafficking cases under Massachusetts law, a judge may order a defendant to pay restitution to the victim as a condition of probation provided that it is “limited to economic losses caused by the defendant’s conduct and documented by the victim.” *See Commonwealth v. McIntyre*, 767 N.E.2d 578, 583 (Mass. 2002); *see also Commonwealth v. Nawn*, 474 N.E.2d 545, 550–51 (1985) (noting that the judge may exercise discretion to determine an amount of restitution that is reasonable and fair, taking into account the defendant’s ability to pay and the value of the victim’s losses).

33. As of 2019, forty-four states have passed statutes that provide criminal record relief to victims of trafficking. *See ERIN MARSH ET AL.*, STATE REPORT CARDS: GRADING CRIMINAL RECORD RELIEF LAWS FOR SURVIVORS OF HUMAN TRAFFICKING, POLARIS PROJECT 10 (2019), <https://polarisproject.org/sites/default/files/Grading%20Criminal%20Record%20Relief%20Laws%20for%20Survivors%20of%20Human%20Trafficking.pdf> [<https://perma.cc/YWP4-Z542>]. Consistent with this trend, in 2018, Massachusetts passed state legislation to allow victims of trafficking to vacate certain criminal dispositions committed “[where the offense] was a result of” their status as a victim under state or federal law. *See MASS. GEN. LAWS* ch. 265, § 59 (2019). Given that the state definition of sex trafficking in Massachusetts is quite broad, this allows a wide array of individuals involved in commercial sex to qualify for post-conviction relief. *See id.* § 50(a).

34. *See generally infra* Part III. There have been similar debates about broadening criminal liability in other contexts, including terrorism and RICO cases. *See, e.g.*, Keiran Hardy & George Williams, *What is “Terrorism”? Assessing Domestic Legal Definitions*, 16 *UCLA J. INT’L L. & FOREIGN AFF.* 77, 88 (2011) (noting that “several human rights bodies have reported that imprecise and overbroad definitions of terrorism in domestic legislation breach the principles of legality”); Peter Henning, *Rico Lawsuits Are Tempting, but Tread Lightly*, *N.Y. TIMES* (Jan. 16, 2018), <https://www.nytimes.com/2018/01/16/business/dealbook/harvey-weinstein-rico.html> [<https://perma.cc/ZXT5-W9HH>] (describing how RICO statutes have been used by plaintiffs in new ways, including recent civil claims against Harvey Weinstein alleging that his sexual abuse conduct amounts to a “Weinstein Sexual Enterprise”).

35. This expansion phenomenon is also present in the context of labor trafficking, but this Article focuses almost exclusively on the sex trafficking context. In the United States, since passage of the TVPA, disproportionate legislative and enforcement efforts have focused on sex trafficking cases, making the trend particularly evident in this context. *See, e.g.*, Janina Pescinski, *A Human Rights Approach to Human Trafficking*, UNITED NATIONS UNIV. (Feb. 20, 2015), <https://ourworld.unu.edu/en/a-human-rights-approach-to-human-trafficking> [<https://perma.cc/V4L2-347S>] (“[T]he disproportionate focus on female sex trafficking obscures the violence and human rights violations experienced by men and children, in addition to women, who are trafficked for other forms of forced labour.”). Despite this, there is also evidence of expansion of the definition of labor trafficking, which is deserving of further research and scholarly focus. State legislatures have broadened the means involved in labor trafficking crimes to include a wider range of conduct. *See, e.g.*, *MASS. GEN. LAWS*

It describes how the crime of human trafficking developed internationally in what some scholars have called a “rigor-free” zone with indefinite outer contours.³⁶ Part I also addresses the establishment in 2000 of U.S. federal human trafficking crimes, which today continue to broaden in application to new actors and conduct.

Part II turns to recent evidence of expansion in the context of sex trafficking. This Article examines judicial and legislative attempts to expose more actors, including hotels, online platforms, and buyers, to civil and criminal liability.³⁷

Part III then examines the factors motivating the expansion of the human trafficking term in hard law. Part III considers how the rise of neo-abolitionist advocacy has contributed to this trend.³⁸ It also explores how other factors, such

ch. 265, § 49 (defining “forced services” to include “services performed or provided by a person that are obtained or maintained by another person” who “knowingly destroys, conceals, removes, confiscates or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document”). Additionally, through expansive third-party liability under the TVPA, plaintiffs have begun to file federal civil cases against a range of third parties, including recruiters, contractors, and other parties that “knowingly benefit” from forced labor and involuntary servitude. See Briana Beltran, *The Hidden “Benefits” of the Trafficking Victim Protection Act’s Expanded Provisions for Temporary Foreign Workers*, 41 BERKELEY J. EMP. & LAB. L. 2, 40–42, 49–50 (forthcoming 2020). Moreover, plaintiffs have filed claims under the forced labor and involuntary servitude statutes for certain previously discrete gender-based crimes, such as domestic violence and sexual assault. See Julie Dahlstrom, *Trafficking to the “Rescue”?* (unpublished manuscript) (on file with the author).

36. See Chuang, *Exploitation Creep*, *supra* note 12, at 609 (citing Luis CdeBaca, Ambassador-at-Large, Office to Monitor and Combat Trafficking in Persons, Freedom Here & Now: Ending Modern Slavery, Remarks Before the Women’s Foundation of Minnesota and the Center for Integrative Leadership (May 8, 2012)).

37. Traditionally, the term “john” has been used to refer to buyers of sex. See HEINZ DUTHEL, MY LADYBOY DATE: GIVE LOVE A CHANCE 223 (2018) (“The term john may have originated from the frequent customer practice of giving one’s name as ‘John,’ [sic] a common name in English-speaking countries, in an effort to maintain anonymity.”). Scholars have criticized this term because it creates anonymity and suggests that the purchase of sex is an expected—even perhaps inevitable—behavior of the “everyman” in society. See, e.g., Bernstein, *Working Sex Words*, *supra* note 10, at 228 (“The lack of a singular noun fit for print in a newspaper or statute implies that buying sex is just an activity or an episode for a man. He can take it or leave it without changing who he is; we feel no more need for a noun here than we need one for ‘movie watcher’ or ‘spectator-sport ticket holder.’”); Catherine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 282 (2011) (noting that the term “john” gives men who buy sex a “common real man’s name” and the “true privacy of anonymity”). For this reason, the term “buyer of sex” is used throughout this Article to refer to individuals who purchase sex.

38. The neo-abolitionist approach views all commercial sex as inherently oppressive and has been termed the “oppression paradigm.” See, e.g., RONALD WEITZER, LEGALIZING PROSTITUTION: FROM ILLICIT VICE TO LAWFUL BUSINESS 10 (2011). This approach is grounded in radical feminism, and “differs from the religious right’s objections to commercial sex” in its view of commercial sex as “the quintessential expression of patriarchal gender relations and male domination.” *Id.*; see also KATHLEEN BARRY, THE PROSTITUTION OF SEXUALITY (1995); Melissa Farley et al., *Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder*, 2 J. TRAUMA PRACTICE 33 (2003); Dorchen Leidholdt, *Prostitution: A Violation of Women’s Human Rights*, 1 CARDOZO WOMEN’S L.J. 133 (1993); Catherine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 28 (1993). Neo-abolitionism has grown in political prominence in the United States

as increased prosecutorial and litigation efforts, have played an essential role. Finally, Part III catalogues and assesses the benefits of efforts to expand the definition of trafficking to new parties. It examines how such efforts have provided new tools to prosecutors and victims. It also considers the challenges wrought by broadening the definition of trafficking, including expanded criminal liability, confusion about the nature of the crime, and serious constitutional questions, among other concerns.

Part IV then outlines principles to guide the “next wave” of human trafficking reform. This Article argues that such reform must be marked not by reflexive expansion, but by selective broadening and careful pruning. This Article thus provides principles to govern these adjustments and cautions that further broadening may rob the concept of its power to compel action.

I.

HUMAN TRAFFICKING: EXPANDING TO CONFRONT THE CONTEMPORARY CRIME

There is remarkable agreement around the world in the collective moral condemnation of human trafficking. In 2012, then-President Obama issued a call to action, reminding his audience, “I’m talking about the injustice, the outrage, of human trafficking, which must be called by its true name—modern slavery.”³⁹ In his speech, he highlighted the continuity of bipartisan political support in combating trafficking, noting that “[a] global movement was sparked, with the Trafficking Victims Protection Act—signed by President Clinton and carried on by President Bush.”⁴⁰

Since then, U.S. President Donald Trump—despite his often-divisive rhetoric about race and immigration enforcement—has promised to bring the “full force and weight” of the U.S. government to bear in confronting the “epidemic” of human trafficking.⁴¹ Shortly thereafter, UN Secretary-General

and parts of Northern Europe, as “proponents of neo-abolitionism, be they radical feminist activists, faith-based lobbyists or politicians, argue that this is the *only* response to the changed circumstances of the sex trade today.” EILIS WARD & GILLIAN WYLIE, *FEMINISM, PROSTITUTION AND THE STATE: THE POLITICS OF NEO-ABOLITIONISM* 1 (2017); see also Jane Scoular & Anna Carline, *A Critical Account of a ‘Creeping Neo-Abolitionism’: Regulating Prostitution in England and Wales*, 14 *CRIMINOLOGY & CRIM. JUST.* 2, 609 (2014) (“An increasingly neo-abolitionist perspective on prostitution policy can be seen to be taking hold in parts of Northern Europe.”). In particular, neo-abolitionists advocate for a criminal legal response to perpetrators of sex trafficking and buyers of sex while decriminalizing victims or “prostituted persons.” See *infra* Part I.A. This Article uses the term “neo-abolitionists” to distinguish these proponents from “abolitionists,” which commonly refers to reformers who sought to eradicate slavery in the United States.

39. Press Release, The White House, Remarks by the President to the Clinton Global Initiative (Sept. 25, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative> [<https://perma.cc/R2F6-N2C4>].

40. See *id.*

41. Tuesday Reitano, *Does ‘Human Trafficking’ Need a New Definition?*, RELIEFWEB (July 31, 2017), <https://reliefweb.int/report/world/does-human-trafficking-need-new-definition> [<https://perma.cc/957N-S5CF>]. President Trump has noted that “[t]rafficking is probably worse today than at any time in our history” and promised to make ending human trafficking a major foreign policy

António Guterres similarly noted that “at a time of divisions in so many areas, [combating human trafficking] should be an issue that can unite us.”⁴²

And yet, despite uniform denunciation, there remains a lack of consensus on the exact contours of the legal definition. What exactly are these world leaders condemning? International and national efforts to define and combat trafficking have intensified in the past twenty years. But a finite, precise legal definition of human trafficking has been elusive.⁴³

The concept of human trafficking emerged as a major legal category when the international community enacted the United Nations Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (“Trafficking Protocol”) in 2000.⁴⁴ Objectively, the Trafficking Protocol was a significant success, as it embodied a fragile consensus among anti-trafficking advocates with diverse ideological perspectives.⁴⁵ It also was notable for the breadth of its

priority. *Trump to Trafficking Victims: You are Not Alone*, CNN (Apr. 11, 2018), <https://www.cnn.com/videos/politics/2018/04/11/trump-signs-sex-trafficking-act.cnn> [<https://perma.cc/HBF7-TVV9>].

42. Press Release, United Nations Secretary-General, Secretary-General’s Remarks at Ministerial Open Debate on Trafficking in Persons in Conflict Situations: Forced Labour, Slavery and Other Similar Practices [As Delivered] (Mar. 15, 2017), <https://www.un.org/sg/en/content/sg/statement/2017-03-15/secretary-generals-remarks-ministerial-open-debate-trafficking> [<https://perma.cc/YQ5L-G7YC>].

43. See, e.g., JO DOEZEMA, SEX SLAVES AND DISCOURSE MASTERS: THE CONSTRUCTION OF TRAFFICKING 5 (2010) (“Trafficking is not a discursively neutral terrain, unwritten and unblemished, upon which facts and responses can simply be attached.”); Michael Dottridge, *Trafficked and Exploited: The Urgent Need for Coherence in International Law*, in REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY 59–60 (Prabha Kotiswaran ed., 2017).

44. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Trafficking Protocol]. The term “white slavery” has a heavily racialized history, referring generally to the forced prostitution of white European women, and as a phenomenon, has been empirically debated. See, e.g., DOEZEMA, *supra* note 43, at 74–77. Under international law, the concept of “white slavery” was abandoned in 1927, although drafters incorporated the concept of forced prostitution into the definition of human trafficking in the Trafficking Protocol. See, e.g., ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 55 (2001) [hereinafter THE INTERNATIONAL LAW].

45. Neo-abolitionist and sex work proponents have markedly different ideological approaches to sex trafficking, which have animated scholarship in the anti-trafficking field. See, e.g., Chuang, *Rescuing Trafficking*, *supra* note 13, at 1657–58 (describing how ideological debates regarding prostitution reform have shaped policy and legislative responses in the United States). For a discussion of neo-abolitionist perspectives of commercial sex, see *supra* note 38. In contrast to neo-abolitionists, advocates of the “sex work” position oppose all criminal legal interventions to commercial sex and “view sex workers as agents with some ability to negotiate within the sex industry.” PRABHA KOTISWARAN, DANGEROUS SEX, INVISIBLE LABOR: SEX WORK AND THE LAW IN INDIA 10 (2011) (“Sex work advocates . . . are agnostic to the commodification of sex per se and . . . [t]hus, their emphasis is on protecting and promoting the rights of sex workers.”); Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335 (2006). Some scholars call this position the “work position,” and this Article refers to proponents of this perspective as “sex work” proponents, feminists, or advocates interchangeably. Admittedly, not all positions fall into the neo-abolitionist and sex work dichotomy. But this Article primarily addresses these two positions, as they are the predominant perspectives animating scholarship, policy, and practice.

definitional framework.⁴⁶ In many ways, its breadth has been a positive feature, allowing countries a degree of flexibility in defining the crime and successfully adapting it to conform to local conditions.⁴⁷ However, it also has proved confusing—at times endangering efforts at international collaboration.⁴⁸

In the wake of the Trafficking Protocol, state parties passed legislation to further define the crime. In 2000, the U.S. Congress enacted the Victims of Trafficking and Violence Protection Act of 2000 (“TVPA”), articulating a narrower definition of human trafficking compared to that of the Trafficking Protocol and focusing on perpetrators who engage in “force, fraud, or coercion” in connection with commercial sex or labor.⁴⁹ Subsequent reauthorizations in 2003, 2006, 2008, 2013, 2015, and 2018 reflected evolutions in protection, prosecution, and prevention.⁵⁰ All fifty states in the United States now have followed suit, establishing state human trafficking crimes varying in scope and purpose.⁵¹ Despite continued challenges, federal and state efforts to define the term have been relatively successful in mobilizing new resources and prosecutorial focus aimed at human trafficking crimes, resulting in increased prosecutions and victim protections.⁵²

See, e.g., Halley et al., *supra* at 347 (describing “‘individualist’ or liberal/libertarian approaches that contemplate the possibility that some prostitution is consensual and therefore not slavery and not the result of trafficking, and consequently . . . are amenable to greater decriminalization or legalization”).

46. *See* Chuang, *Exploitation Creep*, *supra* note 12, at 610.

47. *See, e.g.,* Anne Gallagher, *The International Legal Definition of “Trafficking in Persons”*: *Scope and Application*, in REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, *supra* note 43, at 100 [hereinafter Gallagher, *The International Legal Definition*] (“States have taken the opportunity presented by the Trafficking Protocol’s flexible approach to exploitation, to tailor their understanding of the crime of trafficking in persons to national contexts and priorities.”).

48. *See, e.g.,* Dottridge, *supra* note 43, at 59 (“Terms with relatively clear meanings under international law are stretched to describe broader phenomena. Further, a series of additional terms that refer to the forms of exploitation . . . have ended up sowing confusion.”).

49. Victims of Trafficking and Violence Protection Act of 2000 (TVPA), Pub. L. No. 106–386, § 102(b)(2), 115 Stat. 1464 (2000) (codified at 18 U.S.C. §§ 1581–95 (2018)). Unlike the Trafficking Protocol, which included means such as the “abuse of power or a position of vulnerability,” Congress used the language of “force,” “fraud,” and “coercion” to characterize the prohibited means in the sex trafficking crime and to limit available protections to victims. *See infra* Part I.B.

50. *See* Pub. L. No. 108–21, 117 Stat. 653 (Apr. 30, 2003); Pub. L. No. 108–193, § 5(a), 117 Stat. 2879 (Dec. 19, 2003); Pub. L. No. 109–248, 120 Stat. 615 (July 27, 2006); Pub. L. No. 110–457, 122 Stat. 5069 (Dec. 23, 2008); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, tit. XII, 127 Stat. 54, 136–60 (2013) (amending the TVPA, subsequent reauthorizations, and related legislation related to violence against women); Pub. L. No. 114–22, 129 Stat. 238, 247 (May 29, 2015); Pub. L. No. 115–393, 132 Stat. 5265 (2018).

51. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 486 (2019) [hereinafter TIP REPORT], <https://reliefweb.int/sites/reliefweb.int/files/resources/2019-Trafficking-in-Persons-Report.pdf> [<https://perma.cc/3727-6552>] (“All U.S. states and territories have anti-trafficking criminal statutes.”).

52. Since 2000, federal prosecutions and protections have increased. *See, e.g.,* Susan W. Tiefenbrun, *Updating the Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 38 CASE W. RES. J. INT’L L. 254 (2007) (“Generally, the domestic measures implemented by the U.S. government in response to the TVPA have been slow and steady, but they are more than merely symbolic.”). According to the 2019 Trafficking in Persons Report issued by the U.S. Department of Justice, the U.S. federal government successfully prosecuted

Despite sharing key features, the resulting international, federal, and state definitions of human trafficking vary considerably. Such divergence reflects differences in local political will and ideology. In each context, the definition is not static. Rather, human trafficking law continues to evolve through legislation, judicial interpretation, rhetoric, and government policy.⁵³ As a result, despite considerable achievements in the anti-trafficking field, there are no definitive outer boundaries, leaving judges, prosecutors, legislators, and litigators to continue to test and push the contours of trafficking as a rhetorical term, as a basis for civil liability, and as a crime.⁵⁴

A. *International Efforts to Define Trafficking: Establishing a Broad Framework*

Internationally, the concept of human trafficking was shaped amidst concerns about growing transnational organized crime and “white slavery.”⁵⁵ Early twentieth-century efforts focused squarely on the notion of “white slavery,” drawing attention to the forced prostitution of European women and away from more complex realities of human trafficking.⁵⁶ However, the term “white slavery” was largely discarded in 1927.⁵⁷ International efforts then moved to focus on “traffic,” which referred almost exclusively to the “coerced movement of women and girls abroad for the purposes of prostitution.”⁵⁸

Prostitution-reform debates were notably influential in shaping the early definition of trafficking.⁵⁹ They were also famously divisive.⁶⁰ Neo-abolitionist feminist advocates argued that all prostitution should be defined as sex trafficking, viewing the practice as inherently coercive and harmful to women.⁶¹ They generally supported a broad definition of trafficking and advocated for efforts to criminalize the buyers of sex, prosecute perpetrators, and provide services to victims.⁶² Advocates of the sex work position, alternatively, sought to separate what they viewed as consensual “sex work” from trafficking,

526 traffickers, provided \$31.2 million for forty-five victim service providers specializing in serving trafficking victims, and granted T nonimmigrant status to 580 victims in fiscal year 2018. TIP REPORT, *supra* note 51, at 485–87.

53. *See infra* Part II.A.

54. *See infra* Part III.A.

55. *See supra* note 44.

56. Indeed, early twentieth-century international efforts—rather than defining human trafficking—focused on “white slavery” and efforts to eradicate it. *See* THE INTERNATIONAL LAW, *supra* note 44, at 13. This included the first Convention against White Slavery, adopted in 1904, which addressed the “criminal traffic” of females obtained for “immoral purposes,” followed by the International Convention for the Suppression of the White Slave Traffic in 1910 that retained a similar focus. *See id.*

57. *See id.*

58. *See id.* at 14–16.

59. *See* Chuang, *Exploitation Creep*, *supra* note 12, at 615.

60. *See id.*

61. *See supra* note 38.

62. *See id.*

advocating for a limited definition of trafficking.⁶³ They also argued forcefully against what they viewed as harsh criminal legal interventions or “carceral feminism.”⁶⁴

Amidst such ideological friction, the Trafficking Protocol was a monumental achievement, defining human trafficking internationally for the first time and promoting a common understanding for governments to prosecute the crime and protect victims.⁶⁵ The Trafficking Protocol included an explicit definition of “trafficking in persons” and attempted to consolidate prior international efforts aimed at various forms of exploitation.⁶⁶ In particular, Article 3(a) of the Trafficking Protocol defines “trafficking in persons” as:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.⁶⁷

The Trafficking Protocol definition was significant for its potential breadth.⁶⁸ “Trafficking in persons” included perpetrators who “abuse . . . power or . . . a position of vulnerability”—a quite broad range of conduct.⁶⁹ In addition, the drafters left key terms such as “abuse of power or of a position of vulnerability” undefined, preferring to allow state parties to “dictate the scope and contents of ‘trafficking.’”⁷⁰ Moreover, defined terms such as “exploitation” did little to constrain the concept. For example, “exploitation” referred to conduct including, “at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or

63. See *supra* note 45.

64. See *id.* Sociologist Elizabeth Bernstein coined the term “carceral feminism” to refer to feminist neo-abolitionist advocates’ support of more punitive, criminal legal approaches to trafficking and gender-based violence. See Elizabeth Bernstein, *The Sexual Politics of “New Abolitionism,”* 18 DIFFERENCES 128, 137 (2007).

65. See generally Trafficking Protocol, *supra* note 44.

66. For a description of prior international efforts to define and confront white slavery, forced prostitution, and human smuggling, see THE INTERNATIONAL LAW, *supra* note 44, at 13–24.

67. Trafficking Protocol, *supra* note 44. By ratifying the Trafficking Protocol, countries were obligated to criminalize human trafficking and adopt national laws consistent with the Protocol’s goals. See THE INTERNATIONAL LAW, *supra* note 44, at 13–24; see also Trafficking Protocol, *supra* note 44, art. 3(a). The Trafficking Protocol establishes that children need not demonstrate the means element to establish that they are a victim of trafficking in persons under international law. See *id.* art. 3(c).

68. Trafficking Protocol, *supra* note 44, art. 3(a); see also Jacqueline Bhabha, *Trafficking, Smuggling, and Human Rights*, MIGRATION POL’Y INST. (2005), <https://www.migrationpolicy.org/article/trafficking-smuggling-and-human-rights> [<https://perma.cc/5VX5-Y3SK>] (“This definition of coercion is expansive, reflecting perhaps the concerted input and interest of the human rights and feminist lobbies in the drafting of this protocol.”).

69. Trafficking Protocol, *supra* note 44, art. 3(a).

70. See Chuang, *Exploitation Creep*, *supra* note 12, at 610–13 (arguing that this potential breadth was not accidental but “intentional” so the “activities covered by the term *trafficking* remain very much in the eye of the beholder”).

practices similar to slavery, servitude or the removal of organs.”⁷¹ Thus, the Trafficking Protocol set a floor of practices, leaving state parties to explore and define the outer boundaries.

These uncertain contours, some argue, were necessary to build consensus among disparate actors such as anti-trafficking advocates and governments.⁷² However, its breadth likely was not fully appreciated at the time. Anne Gallagher, a leading anti-trafficking legal scholar, noted that: “I have no doubt that initial enthusiasm for a global agreement on trafficking would have been much less if states had fully understood that its tentacles would eventually reach directly into their factories, farms, fishing boats, and private households.”⁷³ And reach it has—perhaps far beyond what the drafters expected.⁷⁴

B. The Rising Prominence of U.S. Definitions

Just weeks before the Trafficking Protocol was adopted, the U.S. Congress passed the TVPA.⁷⁵ The TVPA established one of the most comprehensive domestic anti-trafficking legislative frameworks in the world.⁷⁶ In particular, Congress enacted a three-pillar framework to focus equal attention on prosecution of perpetrators, protection of victims, and prevention of

71. See Trafficking Protocol, *supra* note 44, art. 3(a).

72. Negotiations involved almost two years of debate during which twenty-four definitions were considered. See UNITED NATIONS ON DRUGS & CRIME, TRAVAUX PRÉPARATOIRES OF THE NEGOTIATIONS FOR THE ELABORATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO 339-48, U.N. Sales No. E.06.V.5 (2006); *Background Information: Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime*, UNITED NATIONS OFF. ON DRUGS & CRIME, <https://www.unodc.org/unodc/en/treaties/CTOC/background/adhoc-committee.html>, [<https://perma.cc/4D48-72KQ>].

73. Anne Gallagher, *Understanding Exploitation*, 33 HARV. INT’L REV. 4, 4 (2011).

74. Gallagher, *The International Legal Definition*, *supra* note 47, at 87 (noting that “the concept of trafficking was considered a specific one: intended to cover instances in which individuals are moved into and/or maintained in a situation of egregious exploitation through means that were themselves highly abusive”). In fact, ten years after the enactment of the Trafficking Protocol, the Working Group of States Parties to the Trafficking Protocol identified the lack of “conceptual clarity” of key terms as a considerable barrier in effectively combating the crime. *Id.*

75. Like the international community, Congress was primarily concerned with the “rapidly expand[ing sex industry],” which encompasses the “sexual exploitation of persons, predominantly women and girls, involving activities related to prostitution, pornography, sex tourism, and other commercial sexual services.” Victims of Trafficking and Violence Protection Act of 2000 (TVPA), Pub. L. No. 106-386, § 102(b)(2), 115 Stat. 1464 (2000) (codified at 18 U.S.C. §§ 1581-95 (2018)). However, Congress also saw labor trafficking as a compelling social problem, noting that “[t]his growing transnational crime also includes forced labor and involves significant violations of labor, public health, and human rights standards worldwide.” *Id.* § 102(b)(3).

76. Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT’L L. 437, 439 (2006) [hereinafter Chuang, *Global Sheriff*].

trafficking.⁷⁷ This framework has remained very influential internationally, as the United States has risen to power as the “global sheriff” on trafficking.⁷⁸

Negotiations leading up to the passage of the TVPA, however, were not immune from the divisive definitional debates that had characterized international efforts. In the United States, neo-abolitionist and evangelical advocates supported broad formulations of the trafficking crime, aimed at eradicating all commercial sex,⁷⁹ while sex work feminists remained convinced of the need for a narrowly tailored definition.⁸⁰ The eventual compromise in the TVPA resulted in a layered definitional approach.⁸¹ This approach had three key features: (1) operative and non-operative definitions of trafficking; (2) differing criminal statutes for sex trafficking and labor trafficking; and (3) a distinct definition of victims of “severe forms of trafficking in persons” that applied only to federal protections.⁸²

First, the TVPA broadly defined the term “sex trafficking” to include the “recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”⁸³ The term in this context was not operative and did not trigger criminal or civil liability.⁸⁴ Congress separately defined the federal crime of sex trafficking of children or by force, fraud, or coercion under 18 U.S.C. § 1591 to criminalize:

(a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce . . . recruits,

77. See Chuang, *Rescuing Trafficking*, *supra* note 13, at 1661 (“President Clinton outlined a comprehensive and integrated policy framework that came to be known as the ‘three Ps’—prosecution of trafficking, prevention of trafficking, and protection of trafficked persons—to guide U.S. antitrafficking initiatives at home and abroad.”).

78. Chuang, *Global Sheriff*, *supra* note 76, at 439.

79. Alicia Peters, *Trafficking in Meaning: Law, Victims, and the State*, 53 (Mar. 2011) (unpublished Ph.D. dissertation, Columbia University), <https://www.ncjrs.gov/pdffiles1/nij/grants/231589.pdf> [<https://perma.cc/7VZM-2SXX>] (“In contrast, [neo-]abolitionist groups argued that trafficking should include all forms of recruitment and transportation for prostitution, regardless of the presence of force or deception.”). Evangelical and faith-based groups also have exercised considerable influence in supporting expansive definitions of sex trafficking internationally. See, e.g., Linda McClain, *Child, Family, State, and Gender Equality in Religious Stances and Human Rights Instruments: A Preliminary Comparison*, in *WHAT IS RIGHTS FOR CHILDREN? THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS INSTRUMENTS: A PRELIMINARY COMPARISON* (Martha Albertson Fineman & Karen Worthington, eds., 2009) (describing the efforts of Concerned Women of America, a faith-based public policy organization, in supporting the “worthy focus” of international efforts to address sex trafficking, in contrast to other international feminist policies by the United Nations, which they viewed as “utopian spin and radical drive”).

80. See *supra* note 45 for a discussion of the sex work position.

81. Peters, *supra* note 79, at 1 (“The TVPA contains an especially complicated and layered definition of trafficking, reflecting the different constituencies [anti-prostitution feminists, evangelical Christians, and human rights advocates] that lobbied for radically different versions of anti-trafficking bills.”).

82. See generally *Victims of Trafficking and Violence Protection Act of 2000 (TVPA)*, Pub. L. No. 106–386, 115 Stat. 1464 (2000) (codified at 18 U.S.C. §§ 1581–95 (2018)).

83. *Id.* § 103(9).

84. See *id.*

entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person;

(2) knowing, or, . . . in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act.⁸⁵

This definition gave rise to criminal penalties, including mandatory minimum sentencing and other conditions at sentencing.

Second, Congress distinguished between sex trafficking and labor trafficking crimes, which included forced labor and involuntary servitude.⁸⁶ In particular, Congress created the new crime of “forced labor,” which applied to conduct involving more subtle forms of coerced labor.⁸⁷ This development came, in part, after *United States v. Kozminski*, in which the Supreme Court limited the then-existing federal crime of involuntary servitude to cases involving the use or threat of physical restraint, physical injury, or the abuse of law or the legal process.⁸⁸

Third, the TVPA established new, significant protections for victims, including access to immigration relief and federal public benefits.⁸⁹ Such benefits were only available to victims of “severe forms of trafficking in persons,” a separate definitional framework, which included:

1. sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
2. the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.⁹⁰

This definition was distinct from that of the federal trafficking crimes. However, it remained firmly rooted in the newly emerging federal criminal definitions of trafficking with terms in common, such as “involuntary servitude, peonage, debt

85. 18 U.S.C. § 1591 (2018). This was more limited than its international counterpart—the Trafficking Protocol—which explicitly included such abstract terms as the “abuse of power” or a “position of vulnerability.” Trafficking Protocol, *supra* note 44, art. 3(a).

86. See TVPA § 112(a)(2).

87. See *id.*

88. See *United States v. Kozminski*, 487 U.S. 931, 952 (1988); see also *United States v. Kaufman*, 546 F.3d 1242, 1261 (10th Cir. 2008) (“The legislative history reveals that, in enacting § 1589, Congress sought to expand Kozminski’s limited definition of coercion under § 1584, stating that “[s]ection 1589 will provide federal prosecutors with the tools to combat severe forms of worker exploitation that do not rise to the level of involuntary servitude as defined in Kozminski.”).

89. 22 U.S.C. § 7102(9) (2018).

90. *Id.* at § 7102(8). Such benefits include certain immigration relief and public benefits for noncitizen victims of “severe forms of trafficking in persons.” See *id.*

bondage, or slavery.” Thus, protections were destined to expand or contract as federal trafficking case law evolved.⁹¹

The TVPA also articulated new benefits for victims, including certain immigration benefits for undocumented victims, such as T nonimmigrant status, (“T visas”), U nonimmigrant status (“U visas”) for victims of violent crime under state or federal criminal law, and Continued Presence.⁹² T visas are available to individuals who can prove that they are victims of “severe forms of trafficking in persons” and meet other eligibility criteria, including cooperation with certain government officials.⁹³ U visas are available to individuals who can prove they are victims of qualifying crimes, including human trafficking, as defined by state or federal law.⁹⁴ The U and T visas offer important benefits to noncitizen victims, including a pathway to residency, employment authorization, and the ability to petition for certain relatives.⁹⁵ Additionally, Congress in 2008 created Continued Presence, a short-term remedy available to potential victims of a severe form of trafficking, who are witnesses in a criminal investigation or file civil litigation against a perpetrator of trafficking under the Trafficking Victims Protection Reauthorization Act (“TVPRA”) of 2003. While not formally an immigration benefit, Continued Presence allows potential victims to receive employment

91. See *infra* Part II for a discussion of the expansion of the human trafficking definition. As the definition broadens, a greater range of victims may qualify for benefits, including but not limited to immigration benefits, civil damages, and criminal restitution.

92. See Immigration and Nationality Act (INA), Pub. L. 89-236, § 101(a)(15)(T), 79 Stat. 911 (1965) (codified as 8 U.S.C. § 1101(a)(15)(T) (2018)); *id.* § 101(a)(15)(U)(i) (codified as 8 U.S.C. § 1101(a)(15)(U)(i)).

93. *Id.* § 101(a)(15)(T) (codified as 8 C.F.R. § 214.11(b)(1)–(3)(i) (2019), 214.11(b)(4) (2019)). T visas are available to individuals who can prove that they are victims of a “severe form of trafficking in persons,” are “physically present in the United States . . . on account of such trafficking in persons,” will comply with “any reasonable request for assistance in the investigation or prosecution of acts of such trafficking in persons” (unless they are under eighteen or meet a limited exception for victims of trauma), and that they will “suffer extreme hardship involving unusual and severe harm upon removal.” *Id.* U and T visas allow noncitizen victims to qualify for immigration status for four years, receive work authorization, petition for certain derivative family members, and eventually apply for lawful permanent residence and citizenship. See U.S. HEALTH & HUMAN SERVS., SERVICES AVAILABLE TO VICTIMS OF HUMAN TRAFFICKING 16–19, https://www.acf.hhs.gov/sites/default/files/orr/traffickingservices_0.pdf [<https://perma.cc/NY5N-7PC4>].

94. INA § 101(a)(15)(U)(i) (codified as 8 U.S.C. § 1101(a)(15)(U)(i)). Applicants for U visas must show that they have suffered substantial physical or mental abuse as a result of having been a victim of a qualifying crime; possess information about the criminal activity; have been helpful, are being helpful, or are likely to be helpful to a certifying agency; and the criminal activity violated the laws of the United States or occurred in the United States or the territories and possessions of the United States. *Id.*

95. The TVPA allowed victims of “severe forms of human trafficking” to qualify for certain public benefits, such as refugee cash assistance, food stamps, and access to the unaccompanied refugee minor program, a residential and foster care program for unaccompanied minors. See Alison Siskin & Liana Sun Wyler, *Trafficking in Persons: U.S. Policy and Issues for Congress*, CONG. RESEARCH SERV. 23, 28–29 (2012), https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1986&context=key_workplace [<https://perma.cc/PJV7-VY58>].

authorization and remain present in the United States “to facilitate the investigation and prosecution of those responsible” for the trafficking crime.⁹⁶

Such immigration protections provide an important lifeline to noncitizen victims to work lawfully and remain in the United States throughout the criminal investigation and prosecution.⁹⁷ U and T visa grants remain relatively rare, especially amidst numerical caps and long waiting times.⁹⁸ However, given the circumscription of immigration protections in recent decades, these remedies have become an increasingly important source of protection for undocumented victims.

The TVPRA of 2003 also created a private right of action for trafficking crimes involving forced labor under 18 U.S.C. § 1589, trafficking into involuntary servitude under 18 U.S.C. § 1590, and sex trafficking of children by force, fraud, or coercion under 18 U.S.C. § 1591.⁹⁹ This allowed a victim to bring a civil action in federal court under 18 U.S.C. § 1595(a).¹⁰⁰ The ability to bring such actions has provided victims with new remedies and allowed civil suits to “fill gaps in the criminal system.”¹⁰¹ In 2008, Congress broadened civil liability

96. 22 U.S.C. § 7105(c)(3) (2018) (stating that Continued Presence is available to “a potential witness to such trafficking” and that “the Secretary of Homeland Security may permit the alien to remain in the United States to facilitate the investigation and prosecution of those responsible for such crime”); see also 28 C.F.R. § 1100.35 (2019). Continued Presence allows the individual to receive employment authorization but does not provide an immigration benefit. See *id.* § 1100.35(b)(1) (“[C]ontinued presence in the United States under this subpart does not convey any immigration status or benefit apart from that already encompassed by the particular form of authorized continued presence granted.”).

97. See U.S. HEALTH & HUMAN SERVS., *supra* note 93.

98. Currently, the processing time for U visas exceeds five years, while the wait for T visas is approximately nineteen months. See *Check Case Processing Times*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://egov.uscis.gov/processing-times> [<https://perma.cc/YDJ4-LRCY>]. Both visas also are statutorily capped by Congress, with only 10,000 U visas and 5,000 T visas available per year. See, e.g., *Questions and Answers: Victims of Human Trafficking, T Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status/questions-and-answers-victims-human-trafficking-t-nonimmigrant-status-0> [<https://perma.cc/K8GU-SNGM>]; *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status> [<https://perma.cc/PG4S-KUFL>].

99. 18 U.S.C. § 1595(a) (2018). Please note that in order to receive civil damages, plaintiffs must demonstrate that the defendant meets the elements of the sex trafficking crime defined at 18 U.S.C. § 1591.

100. 18 U.S.C. §§ 1590(a), 1591(a)(1).

101. ALEXANDRA F. LEVY, FEDERAL HUMAN TRAFFICKING CIVIL LITIGATION: 15 YEARS OF THE PRIVATE RIGHT OF ACTION, HUM. TRAFFICKING LEGAL CTR. 7 (2018), <https://www.htlegalcenter.org/wp-content/uploads/Federal-Human-Trafficking-Civil-Litigation-1.pdf> [<https://perma.cc/5LRR-M9QV>]. Civil remedies can play an important role by allowing victims to confront perpetrators outside of the criminal legal process and seek monetary damages. See *Civil Remedies*, in U.S. DEP’T OF JUSTICE, NEW DIRECTIONS FROM THE FIELD: VICTIMS’ RIGHTS AND SERVICES 373 (1997) (“A judgment in a civil suit can provide . . . compensation as well as . . . important preventative measures that would not result from a criminal action alone.”). Additionally, civil remedies allow litigators to contribute to evolving federal jurisprudence surrounding federal trafficking crimes, especially in regard to terms or circumstances that infrequently emerge in federal criminal prosecutions.

against third parties, establishing that a victim may file a civil suit against defendants who “knowingly benefit[]” by receiving “anything of value” while participating “in a venture” that they either “knew or should have known” violated any provision of the chapter.¹⁰² The inclusion of those who simply “should have known” established broad secondary liability against those who benefit from their associations with perpetrators.¹⁰³

Thus, Congress over time established a new and robust framework for civil recovery for victims of trafficking.¹⁰⁴ By doing so, the TVPRA not only opened new avenues for civil damages but also provided a powerful venue for lawyers to file federal civil claims.¹⁰⁵ This has allowed plaintiffs’ attorneys to exercise greater influence in shaping the evolving meaning of human trafficking under federal law.¹⁰⁶

II.

A BATTLE AT THE MARGINS

A. “Exploitation Creep”

Since the passage of the TVPA in 2000 and largely due to the leadership of the United States, the definition of human trafficking has broadened internationally to include a wide range of practices.¹⁰⁷ This expansion, coined “exploitation creep” by Professor Janie Chuang, includes “efforts to expand previously narrow legal categories—at least in terms of rhetoric and policy, but in some cases also in hard law—in a strategic bid to subject a broader range of practices to a greater amount of public opprobrium.”¹⁰⁸

Chuang described two distinct trends.¹⁰⁹ First, she noted that though trafficking was conceived as a phenomenon involving transportation, this requirement has been largely discarded internationally and domestically,

102. 18 U.S.C. § 1595(a).

103. *See id.*; H.R. REP. NO. 110-430(I), at 55 (2007) (describing the broadening of the civil remedy).

104. Previously, victims could pursue a civil action under the Fair Labor Standards Act, but existing law precluded certain victims, including victims of sex trafficking or domestic workers, from recovery. Kathleen Kim & Kusia Hreshchychyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN’S L.J. 1, 24–25 (2004).

105. *See, e.g.*, THE HUMAN TRAFFICKING PRO BONO LEGAL CTR., ENDING IMPUNITY, SECURING JUSTICE: USING STRATEGIC LITIGATION TO COMBAT MODERN-DAY SLAVERY AND HUMAN TRAFFICKING 6–10 (2015), <http://www.htlegalcenter.org/wp-content/uploads/Ending-impunity-securing-justice.pdf> [<https://perma.cc/7Q7E-2LKU>].

106. *See id.*

107. *See generally* Chuang, *Global Sheriff*, *supra* note 76. Professor Janie Chuang argued that the “intentionally vague” definition in the Trafficking Protocol has allowed parties to “appropriate[] the ‘trafficking’ label so that the activities covered by the term trafficking remain very much in the eye of the beholder.” *See* Chuang, *Exploitation Creep*, *supra* note 12, at 610.

108. *See* Chuang, *Exploitation Creep*, *supra* note 12, at 611.

109. *Id.*

expanding the nature of conduct subject to the definition.¹¹⁰ Second, whereas “slavery” was once reserved for the “the most extreme forms of exploitation (i.e., exercising the powers of ownership over another individual),” the term now applies to all trafficking.¹¹¹ She noted, for example, how neo-abolitionist proponents have bolstered this trend by effectively relabeling all trafficking as “modern-day slavery.”¹¹²

Chuang explained that though such efforts are often “well-intentioned” with the “compelling goal of widening the anti-trafficking net to capture more forms of exploitation,”¹¹³ they are deeply flawed because they rely on punitive criminal legal policies that draw attention away from more structural approaches to combat trafficking.¹¹⁴ She and other legal scholars opined in 2014 that “course correction is much needed and long overdue.”¹¹⁵

However, since then, human trafficking law in the United States has done little to “course correct.” Rather, the definition of human trafficking has expanded with even more striking examples of “exploitation creep” in action. This is especially apparent in the context of sex trafficking, where the legal definition has broadened to encompass new actors, including buyers of sex, online platforms, and hotels.¹¹⁶ It has also incorporated new conduct, including in some instances *any* form of commercial sexual activity and, in other cases, other crimes, such as domestic violence, sexual assault, and labor exploitation.¹¹⁷

B. Taking Aim at New Actors

1. Buyers of Sex with Children and Trafficking Victims

Within the last ten years, targeted litigation and legislation have redefined certain buyers of sex as perpetrators of trafficking under federal law.¹¹⁸ While the TVPA in 2000 created new federal trafficking crimes, Congress failed explicitly to address buyers of sex.¹¹⁹ Instead, federal sex trafficking

110. *Id.* (“[A]ll forced labor is recast as trafficking, even if no one changes location at all.”).

111. *See id.* at 611 (“[A]ll trafficking is labeled as slavery.”).

112. *Id.* at 615, 624.

113. *Id.* at 611.

114. *See id.*

115. *See id.* at 612; *see, e.g.*, Karen E. Bravo, *A Crossroads in the Fight Against Human Trafficking? Let’s take the Structural Route: A Response to Janie Chuang*, 108 AM. J. INT’L. L. UNBOUND 277, 272–76 (2014); Chantal Thomas, *Anti-Trafficking Law as a Key to Global Economic Contradictions: A Response to Janie Chuang*, 108 AM. J. INT’L. L. UNBOUND 277 (2014).

116. *See generally supra* Part II. This phenomenon is also present in the labor trafficking context, although not the focus of this Article. *See supra* note 35.

117. *See infra* Part II.C.2.

118. As described in this Article, a perpetrator of human trafficking under 18 U.S.C. § 1591 now includes both “pimps” and certain buyers. For the sake of clarity, this Article refers to buyers as “buyers of sex” or “buyer-defendants” to avoid confusion.

119. *See generally* Victims of Trafficking and Violence Protection Act of 2000 (TVPA), Pub. L. No. 106–386, 115 Stat. 1464 (2000) (codified at 18 U.S.C. §§ 1581–95 (2018)).

prosecutions generally revolved around only two parties: the victim and the “pimp.”¹²⁰

A typical federal sex trafficking case might resemble *United States v. Haskins*.¹²¹ Therein, Lenny Paul Haskins lured at least seventeen adult and minor females, some as young as fifteen, to engage in commercial sex under false pretenses.¹²² According to court pleadings, he provided the victims with drugs and tattooed his nickname, “2 Much,” on their bodies.¹²³ Or, a federal sex trafficking case may look like *United States v. Mendez-Hernandez*, wherein the defendant, Joaquin Mendez-Hernandez, recruited women from Mexico and Nicaragua with false promises of easy money and a good life.¹²⁴ He then forced them to perform twenty to fifty commercial sex acts per day in the United States.¹²⁵ To coerce some victims, he held their children hostage in Mexico and threatened violence against their families.¹²⁶

In criminal cases such as these, buyers of sex remained unnamed and generally immune from criminal punishment.¹²⁷ Rather, many buyers of sex

120. Black’s Law Dictionary defines a “pimp” as “[s]omeone who solicits customers for a prostitute . . . in return for a share of the prostitute’s earnings.” State law largely defines the term, frequently requiring that the individual knowingly derived support from prostitution. *See* BLACK’S LAW DICTIONARY 1333 (10th ed. 2014). With the passage of the TVPA in 2000, the use of the term “pimp” colloquially often has become synonymous with a perpetrator of trafficking, although federal trafficking law requires “force, fraud, or coercion” unless the case involves a child. *See* 18 U.S.C. § 1591(b)(1) (2018); *see, e.g.*, ALEXANDRA PRIEBE & CRISTEN SUHR, HIDDEN IN PLAIN VIEW: THE COMMERCIAL SEXUAL EXPLOITATION OF GIRLS IN ATLANTA 5 (2005), https://childhub.org/en/system/tdf/library/attachments/atlanta_women_05_girls_0109.pdf?file=1&type=node&id=18594 [<https://perma.cc/XC5Q-GEGF>]. Many scholars eschew the use of the term “pimp” as it often has racial implications, propagating inaccurate stereotypes of African American men. *See, e.g.*, Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1489–90 (2015); Evelina Giobbe, *An Analysis of Individual, Institutional, and Cultural Pimping*, 1 MICH. J. GENDER & L. 34–35 (1999).

121. *See* Sentencing Memorandum of the United States at 2, 8, in *United States v. Haskins*, Docket No. 1:14-cr-00432 (E.D. Va. Dec. 30, 2014).

122. *See id.* at 1, 13; *see also* Press Release, U.S. Attorney’s Office, Las Vegas Man Sentenced to 40 Years in Prison for Sex Trafficking (May 1, 2015), <https://www.justice.gov/usao-edva/pr/las-vegas-man-sentenced-40-years-prison-sex-trafficking> [<https://perma.cc/DK59-B9AQ>].

123. Sentencing Memorandum of the United States at 2–3, in *United States v. Haskins*, No. 1:14-cr-00432 (E.D. Va. Dec. 30, 2014).

124. *See* Sealed Indictment at 4–5, *United States v. Mendez-Hernandez*, No. 4:13-cr-00004 (S.D. Ga. Jan. 11, 2013); Press Release, U.S. Attorney’s Office, Leader of International Sex Trafficking Ring Sentenced to Life in Prison (Feb. 19, 2014) [hereinafter *Press International Sex Trafficking Ring Leader Imprisoned*], <https://archives.fbi.gov/archives/atlanta/press-releases/2014/leader-of-international-sex-trafficking-ring-sentenced-to-life-in-prison> [<https://perma.cc/YY9B-8M8V>].

125. Press International Sex Trafficking Ring Leader Imprisoned, *supra* note 124.

126. *See id.*

127. In *Haskins*, the government in its sentencing memorandum referred to “sex customers” but did not charge any buyers of sex or name them in the court pleadings. *See, e.g.*, Sentencing Memorandum, *Haskins*, *supra* note 121. Historically, buyers of sex rarely faced criminal punishment. *See, e.g.*, Megan Anitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL’Y REV. 1, 18 (2011) (“[Y]oung girls are prosecuted at reportedly higher rates than even the men who exploit them.”) (citations omitted); Cynthia Godsoe, *Punishment as Protection*, 52 HOUS. L. REV. 1313, 1318 n.20 (2015) (“Most customers of

were considered “helpful”—even necessary—witnesses in federal sex trafficking prosecutions.¹²⁸ This is because, while the TVPA established new tools to address perpetrators of trafficking, it left states and localities to reconcile the antiquated criminal approaches that still applied to buyers and victims. Buyers remained subject to state crimes, such as solicitation of sex or sex for fee, and theoretically subject to statutory rape or child abuse crimes. Yet, few buyers were prosecuted. In stark contrast, those selling sex—including victims of sex trafficking—were frequently arrested and prosecuted under state solicitation and related laws.¹²⁹

Over time, feminist advocates internationally conceived of new legal approaches, focusing on buyers of sex, often known as the “demand” for sex trafficking.¹³⁰ Neo-abolitionist feminist advocates largely supported this demand-focused movement, viewing commercial sex as an economic transaction with supply (i.e., victims) and demand (i.e., buyers).¹³¹ In 1998, Sweden developed the first and most well-known demand-focused approach, known

prostituted minors are not arrested or prosecuted at all.”); Jane O. Hansen, *Selling Atlanta’s Children: What has and hasn’t changed*, CNN (July 15, 2015), <http://www.cnn.com/2015/07/17/us/child-sex-trafficking-update-hansen/index.html> [<https://perma.cc/WM5E-7DK2>] (“In Georgia in 2000, while children were being arrested, put in jail, and chained like the worst of criminals, the men selling them and having sex with them were rarely arrested.”).

128. Historically, arrests of buyers of sex were relatively infrequent. *See, e.g.*, Mary Leary, *Dear John, You are a Human Trafficker*, 68 S.C. L. REV. 415, 422 (2017) [hereinafter Leary, *Dear John*]. There have been more prosecutions as of late, as more law enforcement and prosecutorial attention has turned to buyers, but these efforts remain sporadic and geographically limited. *See, e.g.*, Nicole Chavez, *More Than 1,000 Arrests in Sex Trafficking Operation*, CNN (Aug. 4, 2017), <https://www.cnn.com/2017/08/04/us/sex-trafficking-sting/index.html> [<https://perma.cc/YYS6-W3TG>] (quoting Sheriff Thomas Dart confirming that “[t]he National Johns Suppression Initiative operations have led to the arrest of nearly 8,000 sex buyers since 2011”).

129. While data are limited because prostitution arrests and prosecutions are not comprehensively tracked, conservative estimates from the U.S. Department of Justice in 2015 indicate that as many as 1,000 child victims of sex trafficking were arrested in one year. *See* Stella Dawson, *U.S. Jails Sex-Trafficked Kids in Human Rights Abuse, Group Says*, REUTERS (Mar. 16, 2015), <http://www.reuters.com/article/2015/03/17/us-trafficking-us-children-idUSKBN0MD0AJ20150317> [<https://perma.cc/RT9Q-FETD>]. Such data are likely a gross underestimate given the lack of reporting and the fact that thousands of children are at risk annually of becoming victims of commercial sexual exploitation. *See* Juan David Romero, *Why Do We Treat Child Sex-Trafficking Victims Like Criminals?*, NEW REPUBLIC (Dec. 4, 2014), <https://newrepublic.com/article/120418/underage-sex-trafficking-victims-are-treated-criminals-us> [<https://perma.cc/T4FM-ECTZ>].

130. *See* Leary, *supra* note 128, at 422–23.

131. *See, e.g.*, U.S. DEP’T OF STATE, BEST PRACTICES TO ADDRESS THE DEMAND SIDE OF SEX TRAFFICKING 1–2 (2004), https://www.researchgate.net/publication/237564679_Best_Practices_to_Address_the_Demand_Side_of_Sex_Trafficking [<https://perma.cc/6A64-RJMP>] (“Over the past decade . . . efforts to combat trafficking have aimed to stop trafficking on the supply side In comparison, there have been few campaigns or efforts aimed at reducing the demand for victims.”); Melissa Farley, *Prostitution Harms Women Even If Indoors: Reply to Weitzer*, 7 VIOLENCE AGAINST WOMEN 950–64 (2005); Mireya Navarro, *The West Gets Wilder*, N.Y. TIMES (Jan. 8, 2006), <http://www.nytimes.com/2006/01/08/fashion/sundaystyles/the-west-gets-wilder.html> [<https://perma.cc/Q8PY-NR7V>].

often as the “Nordic Model.”¹³² The Nordic Model sought to: (1) criminalize the purchase of sex; (2) decriminalize “prostituted” and trafficked persons; and (3) provide comprehensive services to anyone who provides sexual services.¹³³ Although one of the goals of these efforts was to decriminalize the conduct of “prostituted” persons, the efforts were controversial, especially to scholars and advocates who supported the sex work position because they argued that criminal legal interventions against buyers and perpetrators of trafficking drive commercial sex underground, making it more dangerous for “consensual sex workers.”¹³⁴

Despite such criticism, neo-abolitionist advocates gained political power and momentum in the United States. In particular, an alliance of certain evangelical and anti-trafficking non-profit organizations engaged in targeted legislative and litigation efforts to stretch the trafficking crime to reach buyers of sex.¹³⁵ These efforts focused largely on re-labeling certain buyers as perpetrators of trafficking.¹³⁶

Federal criminal prosecutors, seeking to apply then-existing federal trafficking law to buyers, made creative legal arguments that were important to

132. See, e.g., EQUALITY NOW, WHAT IS THE ‘NORDIC MODEL,’ <http://atzum.org/wp-content/uploads/2013/10/Nordic-Model-Equality-Now.pdf> [<https://perma.cc/T63Q-7FZ9>] (describing and advocating for the Nordic Model); MICHAEL SHIVELY, U.S. DEP’T OF JUSTICE, A NATIONAL OVERVIEW OF PROSTITUTION AND SEX TRAFFICKING DEMAND REDUCTION EFFORTS, FINAL REPORT, DOC. No. 238796 (2012), at iv (noting that the “illicit markets of prostitution and sex trafficking are, like any other markets, driven by demand” and providing evidence that demand-focused interventions are effective); Max Waltman, *Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law*, 33 MICH. J. INT’L L. 133, 138 (2011). The Nordic Model has been referred to as the Sex Buyer Law, Swedish Model, Abolitionist Model, or Equality Model, but this Article uses the term, “Nordic Model.”

133. Josefine Blick, *Combatting the Business of Human Trafficking in the United States Through Implementation of the Nordic Model*, FIU L. REV. (Nov. 29, 2017), <https://law.fiu.edu/2017/11/19/combating-business-human-trafficking-united-states-implementation-nordic-model> [<https://perma.cc/8LGF-4JLG>].

134. See, e.g., Stephanie Berger, *No End in Sight: Why the ‘End Demand’ Movement is the Wrong Focus for Efforts to Eliminate Human Trafficking*, 35 HARV. J.L. & GENDER 523 (2012).

135. Neo-abolitionists and sex work proponents have markedly different views on how to approach “demand,” with neo-abolitionists strongly supporting increased criminal penalties for buyers and sex work proponents opposing criminal penalties for buyers. Compare Emily Bazelon, *Should Prostitution Be a Crime?*, N.Y. TIMES (May 5, 2016), <https://www.nytimes.com/2016/05/08/magazine/should-prostitution-be-a-crime.html> [<https://perma.cc/L86L-B9JR>] (interviewing adult “sex workers” who “raised questions about how punishing buyers would make their lives better; they would still be participating in illegal transactions and have something to hide”), with Gloria Steinem, *Letter to the Editor*, N.Y. TIMES (May 20, 2016), <https://www.nytimes.com/2016/05/22/magazine/the-5-816-issue.html> [<https://perma.cc/YM9E-437E>] (arguing that efforts to combat demand “ha[ve] been more successful than any other model because it recognizes the power difference between buyer and bought”).

136. Even within the advocacy groups supporting demand efforts, there were divisions about whether to address all buyers of sex or only demand involving children and/or trafficking victims. Federally, legislative efforts have focused on the latter, transforming the purchase of sex with a child or trafficking victim into a federal sex trafficking crime.

this advocacy.¹³⁷ At the time, the federal crime of “sex trafficking of children or by force, fraud, or coercion” required a prohibited action, namely that a perpetrator: (1) recruits, entices, harbors, transports, provides, or obtains by any means a person; or (2) benefits, financially or by receiving anything of value.¹³⁸ Though solicitation of sex was not addressed explicitly in the TVPA, prosecutors argued that courts should interpret the verb “obtains” to include the purchase of sex.¹³⁹

In February 2009, federal prosecutors in the United States District Court for the Western District of Missouri used this novel approach to charge buyers of sex with children with sex trafficking.¹⁴⁰ A federal law enforcement task force engaged in “Operation Guardian Angel,” an undercover operation in which officers placed online advertisements for “little girls” and recorded buyers who paid cash for sex with minors.¹⁴¹ In response, the U.S. Attorney’s Office brought charges of “attempted” commercial sex trafficking in violation of 18 U.S.C. §§ 1591 and 1594(a) against seven men.¹⁴² Remarkably, all seven men pleaded guilty and received sentences of five to fifteen years.¹⁴³ “Operation Guardian

137. See generally Samantha Vardaman et al., *Prosecuting Demand as a Crime of Human Trafficking: The Eighth Circuit’s Decision in United States v. Jungers*, 43 U. MEM. L. REV. 917 (2013) (describing how prosecutors engaged in creative efforts under the then-existing TVPA to charge buyers of sex with children with trafficking offenses).

138. 18 U.S.C. §§ 1591(a), 2422(b) (2018).

139. See Vardaman et al., *supra* note 137, at 936–39.

140. See, e.g., Indictment at 2, *United States v. Oflyng*, No. 09-00084-01-CR-W-SOW (W.D. Mo. Mar. 10, 2009); Indictment at 2, *United States v. Childers*, No. 4:09-cr-00079-HFS (W.D. Mo. Mar. 10, 2009); Indictment at 2, *United States v. Albers*, No. 4:09-cr-00078-FJG (W.D. Mo. Mar. 10, 2009); Indictment at 2, *United States v. Cockrell*, No. 4:09-cr-00080-DW (W.D. Mo. Mar. 10, 2009); Indictment at 1–2, *United States v. Doerr*, No. 4:09-cr-00031-FJG (W.D. Mo. Feb. 3, 2009); Indictment at 2, *United States v. Johnson*, No. 4:09-cr-00034-DW (W.D. Mo. Feb. 3, 2009); Indictment at 2, *United States v. Mikoloyck*, No. 4:09-cr-00036-GAF (W.D. Mo. Feb. 3, 2009). Prior to 2009, federal prosecutors generally used the Mann Act to prosecute buyers or attempted buyers of sex with children, if at all. See Vardaman et al., *supra* note 137, at 954–55. In fact, in *United States v. Jungers*, the court referenced the existence of the Mann Act as evidence that Congress did *not* intend the TVPA to extend to buyers of sex with children. See 834 F. Supp. 2d 930, 934 (D.S.D. 2011), *rev’d*, 702 F.3d 1066 (8th Cir. 2013).

141. Press Release, U.S. Attorney’s Office, Human Trafficking Rescue Project: Operation Guardian Angel (Mar. 10, 2009), <https://archives.fbi.gov/archives/kansascity/press-releases/2009/kc031009.htm> [<https://perma.cc/6LKK-EMPK>].

142. See Indictment at 1, *Oflyng*, *supra* note 140; Indictment at 1, *Childers*, *supra* note 140; Indictment at 1, *Albers*, *supra* note 140; Indictment at 1, *Cockrell*, *supra* note 140; Indictment at 1, *Doerr*, *supra* note 140; Indictment at 1, *Johnson*, *supra* note 140; Indictment at 1, *Mikoloyck*, *supra* note 140.

143. See Judgment at 2, *United States v. Oflyng*, No. 09-00084-01-CR-W-SOW (W.D. Mo. Mar. 10, 2009); Judgment at 2, *United States v. Childers*, No. 4:09-cr-00079-HFS (W.D. Mo. Mar. 10, 2009); Judgment at 2, *United States v. Albers*, No. 4:09-cr-00078-FJG (W.D. Mo. Mar. 10, 2009); Judgment at 2, *United States v. Cockrell*, No. 4:09-cr-00080-DW (W.D. Mo. Mar. 10, 2009); Judgment at 2, *United States v. Doerr*, No. 4:09-cr-00031-FJG (W.D. Mo. Feb. 3, 2009); Judgment at 2, *United States v. Johnson*, No. 4:09-cr-00034-DW (W.D. Mo. Feb. 3, 2009); Judgment at 2, *United States v. Mikoloyck*, No. 4:09-cr-00036-GAF (W.D. Mo. Feb. 3, 2009).

Angel” was a victory for certain advocates, but it did not establish a clear legal precedent.¹⁴⁴

In February 2011, the U.S. Attorney’s Office for the District of South Dakota tried to replicate these results by charging Ronald Bonestroo and Daron Lee Jungers, buyers of sex with children, with attempted commercial sex trafficking.¹⁴⁵ Unlike the Missouri defendants, however, Bonestroo and Jungers declined to plead guilty and argued that Congress had not intended the TVPA to reach buyers of sex with children.¹⁴⁶

The district court found in favor of Jungers, holding that “evidence presented at trial [was] legally insufficient to support a conviction for sex trafficking under § 1591.”¹⁴⁷ Of particular note, the district court vehemently disagreed with the expansive vision of the trafficking crime advocated by the government. The judge noted that:

Reading the terms “recruits,” “entices,” and “obtains” first in the context of the other language in § 1591 and then in the context of that statute as a whole, the Court is convinced that the purpose of § 1591 is to punish sex traffickers and that Congress did not intend to expand the field of those prosecuted under that statute to those who purchase sex made available by traffickers.¹⁴⁸

In particular, the court found that “[b]ecause the text of § 1591 is not ambiguous, the Court need not consider the legislative history.”¹⁴⁹ Forcefully, the court went on to explain that even if the legislative history were relevant, it only serves to “reinforce[] the Court’s conclusion.”¹⁵⁰ Thus, the court found that the TVPA should *only* apply to “those engaging in the business of human trafficking”—not to buyers.¹⁵¹

The government appealed, leading to the 2013 landmark decision in *United States v. Jungers* at the Eighth Circuit, which extended the TVPA to buyers.¹⁵² In stark contrast to the district court, the Eighth Circuit adopted a very broad

144. See *Jungers*, 834 F. Supp. 2d at 934 (“The fact that the government has used § 1591 to charge customers, without being challenged for doing so, does not create convincing legal precedent.”).

145. See Criminal Complaint at 1, *United States v. Jungers*, 834 F. Supp. 2d 930 (D.S.D. Feb. 14, 2011), *rev’d*, 702 F.3d 1066 (8th Cir. 2013) (No. 4:11-mj-00011-LLP); Criminal Complaint at 1, *United States v. Bonestroo*, 2012 WL 13704 (D.S.D. Feb. 11, 2011) (No. CR 11-40016-01-KES), *rev’d sub nom.* *United States v. Jungers*, 702 F.3d 1066 (8th Cir. 2013) (No. 4:11-cr-40016).

146. See *Bonestroo*, 2012 WL 13704, at *5; *Jungers*, 834 F. Supp. 2d at 932–33.

147. *Jungers*, 834 F. Supp. 2d 930, 934 (D.S.D. 2011).

148. *Id.* at 933.

149. *Id.* at 934 (citing *Lambur v. Yates*, 148 F.2d 137, 139 (8th Cir. 1945)).

150. *Id.* (“The legislative history cited by the parties overwhelmingly indicates that § 1591 was intended for prosecution of traffickers, those who buy and sell human beings for use in prostitution enterprises, rather than potential customers whose illegal activities were already penalized by other statutes.”).

151. *Id.* at 933.

152. See 702 F.3d 1066 (8th Cir. 2013). The Eighth Circuit found that “the TVPA definition of ‘sex trafficking’ . . . readily includes the actions of a purchaser whose sole purpose is obtaining a child for sex.” *Id.* at 1072.

interpretive approach to the sex trafficking crime.¹⁵³ The court noted that the statutory language of “[s]ection 1591(a)(1) makes no distinction between suppliers or purchasers of commercial sex acts with children—it prohibits acts of trafficking regardless of the identity or status of the trafficker.”¹⁵⁴ The Eighth Circuit further concluded that “the expansive language of § 1591 criminalizes a broad spectrum of conduct relating to the sex trafficking of children.”¹⁵⁵

This was a clear victory for certain anti-trafficking advocates, marking the first Court of Appeals decision to apply the TVPA to buyers of sex with children. It was also an important example of judicial interpretation, opening the doors to expansive, new visions of human trafficking. The reach of *Jungers* was limited, however, as it applied only within the Eighth Circuit and was subject to contradictory interpretations in other circuits. As a result, some anti-trafficking advocacy groups sought to pass federal legislation to expand the crime more definitively.¹⁵⁶

Eventually, Congress passed the Justice for Victims of Trafficking Act of 2015 (“JVTA”).¹⁵⁷ The JVTA broadened the reach of governmental responses to human trafficking in several areas, namely: (1) victim services and benefits; (2) criminal justice responses; (3) domestic sex trafficking; and (4) collaboration and education efforts.¹⁵⁸ The JVTA also ultimately established that buyers of sex with children and with trafficking victims should be treated as perpetrators of sex trafficking under federal law.¹⁵⁹ In particular, the legislation added “patronizes,” “solicits,” and “advertises” to the list of prohibited actions in 18 U.S.C. § 1591. The legislation also diminished the evidentiary burden on prosecutors in cases involving buyers of sex with children, establishing that if the defendant “had a reasonable opportunity to observe the person . . . , the Government need not prove that the defendant knew that the person had not attained the age of 18 years.”¹⁶⁰

This was a significant change in anti-trafficking law and policy, carving out considerable federal authority over certain buyers of sex and conclusively expanding the scope of the human trafficking crime. Parallel efforts have now

153. *Id.* at 1066.

154. *Id.* at 1071.

155. *See id.* at 1070 (internal quotation omitted).

156. Such groups included Rights4Girls, Coalition Against Trafficking in Women, Shared Hope International, End Child Prostitution and Trafficking in the USA, National Children’s Alliance, National Association to Protect Children, Equality Now, and National Conference of State Legislatures. *See* GOV’T PUBL’G OFFICE, 1-YEAR ANNIVERSARY FOR JUSTICE FOR VICTIMS OF TRAFFICKING ACT (May 23, 2016), <https://www.govinfo.gov/content/pkg/CREC-2016-05-23/html/CREC-2016-05-23-pt1-PgH2953.htm> [<https://perma.cc/CDD6-RXCP>].

157. Justice for Victims of Trafficking Act, Pub. L. No. 114-22, § 1, 129 Stat. 227 (2015).

158. *See id.*

159. *See id.* §§ 108, 114 (noting that the purpose of the change is to “mak[e] absolutely clear for judges, juries, prosecutors, and law enforcement officials that criminals who purchase sexual acts from human trafficking victims may be arrested, prosecuted, and convicted as sex trafficking offenders when this is merited by the facts of a particular case”).

160. 18 U.S.C. § 1591(c) (2018).

occurred at the state level, with at least twenty-one states updating or passing statutes defining the purchase of sex with minors as trafficking.¹⁶¹ An additional eighteen states have passed trafficking statutes that include the “obtains” language that was used to charge buyers of sex with children, as in *United States v. Jungers*, and may be interpreted to apply to such buyers.¹⁶²

2. *Backpage and Other Websites that Facilitate Sex Trafficking*

A similar trend has surfaced in the context of online platforms. In 2018, litigation against Backpage, the then-leading online platform for commercial sex ads, fueled legislative efforts to pass federal legislation expanding civil and criminal liability to online platforms that facilitate sex trafficking.¹⁶³ Unlike in the buyer context, these efforts did not amend the TVPA but rather removed a statutory barrier, namely Section 230 of the Communications Decency Act (“CDA”), which was passed in 1996 to protect online platforms from civil liability for third-party content.¹⁶⁴ Ironically, the CDA emerged as an effort to limit access to sexually explicit material but evolved to become an extensive “safe harbor” for online platforms by protecting them from civil liability for harmful conduct, ranging from sex trafficking to online abuse.¹⁶⁵

The TVPRA of 2003 created a civil remedy for trafficking victims, making civil lawsuits against online platforms possible.¹⁶⁶ Then, the TVPRA of 2008 permitted civil suits against third parties who “knowingly benefit[]” from a federal trafficking crime.¹⁶⁷ This provision addressed those who benefit “financially or by receiving anything of value, from participation in a venture which that person knew or should have known has engaged in an act in violation

161. SHARED HOPE INT’L, DEMANDING JUSTICE 16 (2014), http://sharedhope.org/wp-content/uploads/2014/08/Demanding_Justice_Report_2014.pdf [<https://perma.cc/682N-H4VF>].

162. *Id.*

163. See, e.g., Tom Jackman, *House Passes Anti-Online Sex Trafficking Bill, Allows Targeting of Websites Like Backpage.com*, WASH. POST (Feb. 27, 2018), <https://beta.washingtonpost.com/news/true-crime/wp/2018/05/30/human-trafficking-victim-forced-to-work-10-years-for-no-pay-awarded-8-million-by-federal-judge> [<https://perma.cc/E9H6-M4M9>]. This Article uses the term “online platform” to refer to “information content providers,” including websites, social media, and other platforms, which are defined in the CDA as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f)(3) (2018). This Article refers to the website Backpage.com as “Backpage.”

164. 47 U.S.C. § 230(c)(1) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

165. Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity*, 86 FORDHAM L. REV. 401, 403 (2017); Mary Leary, *The Indecency and Injustice of Section 230 of the Communications Decency Act*, 41 HARV. J.L. & PUB. POL’Y 553, 557 (2018) (“[A]lthough § 230 was never intended to create a regime of absolute immunity for defendant websites, a perverse interpretation of the non-sex-trafficking jurisprudence for § 230 has created a regime of de facto absolute immunity from civil liability or enforcement of state sex-trafficking laws.”).

166. 18 U.S.C. § 1595(a) (2018).

167. *Id.*

of [Chapter 77 of Title 18, federal laws prohibiting peonage, slavery, forced labor, and trafficking].”¹⁶⁸ The TVPRA, thus, opened the door for civil suits against a range of defendants, including online platforms, hotels,¹⁶⁹ doctors,¹⁷⁰ and labor recruiters,¹⁷¹ among others.¹⁷²

Without question, the internet has greatly changed the nature of sex trafficking.¹⁷³ Sex trafficking once occurred in plain view, “on the streets, at casinos and truck stops, and in other physical locations.”¹⁷⁴ But it now increasingly occurs online and indoors.¹⁷⁵ Rather than replacing outdoor venues, the internet has “expand[ed] the underground commercial sex market by providing a new venue” for commercial sex.¹⁷⁶ Dozens of websites, such as Backpage, Craigslist, and Rubmaps, have emerged to host hundreds of ads daily and millions of ads annually for commercial sex, many of which involve sex trafficking.¹⁷⁷

Online platforms have played an important and evolving role in child sex trafficking.¹⁷⁸ From 2010 to 2015, the National Center for Missing and Exploited Children (“NCMEC”) received an 846 percent increase in reported suspected child sex trafficking, which was “directly correlated to the increased use of the

168. *Id.*

169. *See infra* Part II.B.3 for a discussion of third-party liability for hotels.

170. *See, e.g., Doe v. Dabbagh*, No. 2:15-cv-10724 (E.D. Mich. Feb. 26, 2015) (ordering a Michigan psychiatrist to pay a half-million dollars in damages to a victim of sex trafficking for forcibly drugging her with Adderall).

171. *See* Beltran, *supra* note 35, at 49–50 (describing civil suits under the TVPRA seeking to hold labor recruiters accountable).

172. *See Federal Human Trafficking Civil Litigation: 15 Years of the Private Right of Action*, HUM. TRAFFICKING LEGAL CTR. (2018) [hereinafter *15 Years Report*], <http://www.htlegalcenter.org/wp-content/uploads/Federal-Human-Trafficking-Civil-Litigation.pdf> [https://perma.cc/E6CS-WSUG].

173. *See, e.g.,* STAFF OF S. SUBCOM. ON INVESTIGATIONS, 115TH CONG., BACKPAGE.COM’S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING 4 (2017) [hereinafter SENATE REPORT] (citing *Aff. of Staca Shehan, Backpage.com, LLC v. Dart*, Doc. 88-4, ¶ 17 (N.D. Ill. Oct. 6, 2015) (No. 15-cv-6340)).

174. *Id.* at 5 (citing URBAN INSTITUTE, ESTIMATING THE SIZE AND STRUCTURE OF THE UNDERGROUND COMMERCIAL SEX ECONOMY IN EIGHT MAJOR US CITIES 234 (2014) [hereinafter COMMERCIAL SEX ECONOMY], <https://www.urban.org/research/publication/estimating-size-and-structure-underground-commercial-sex-economy-eight-major-us-cities> [https://perma.cc/YX87-45PZ] (“The overall sex market has expanded . . . and law enforcement detection has been reduced.”)).

175. *See id.*

176. *Id.* (citing COMMERCIAL SEX ECONOMY, *supra* note 174, at 234).

177. *See, e.g.,* POLARIS PROJECT, HUMAN TRAFFICKING IN ILLICIT MASSAGE BUSINESSES (2018), <https://polarisproject.org/wp-content/uploads/2019/09/Human-Trafficking-in-Illicit-Massage-Businesses.pdf> [https://perma.cc/C3CS-HYCK].

178. The U.S. Department of Justice has reported that more than 50 percent of reported victims of sex trafficking in the United States are under eighteen years of age. SENATE REPORT, *supra* note 173, at 4 (citing U.S. DEP’T OF JUSTICE, LITERATURE REVIEW: COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN/SEX TRAFFICKING 3 (2014), <http://www.ojjdp.gov/mpg/litreviews/CSECSexTrafficking.pdf> [https://perma.cc/Z73S-EGFR]).

internet to sell children for sex.”¹⁷⁹ In fact, in 2017, NCMEC reported that 73 percent of reports of child trafficking received from the general public involved Backpage.¹⁸⁰ Backpage—until it was shuttered in 2018—remained the leader in online commercial sex advertising since 2004, netting more than 80 percent of all revenue from commercial sex advertising in the United States in 2013.¹⁸¹ In 2017, forty-five state attorneys general called Backpage the “hub” of “human trafficking, especially the trafficking of minors.”¹⁸² They noted that more than fifty trafficking cases over a three-year period involved Backpage and called the website’s efforts to screen out perpetrators of trafficking “ineffective.”¹⁸³

To address such concerns, litigators began to file civil suits under the TVPA against Backpage on behalf of child victims seeking civil damages.¹⁸⁴ They argued that Backpage should be held liable due to the platform’s knowledge or reckless disregard of sex trafficking on the platform.¹⁸⁵ For example, in September 2010, M.A., a fifteen-year-old victim of sex trafficking in Missouri, sued Backpage alleging that the website aided and abetted sex trafficking.¹⁸⁶ According to the complaint, the victim was fourteen years old when an alleged perpetrator of trafficking on the site sold her to buyers of sex throughout the state.¹⁸⁷ However, the district judge found that Backpage was practically immune from civil suit due to Section 230 of the CDA.¹⁸⁸ In the decision, the court observed the emerging tension between an expanding conception of trafficking and the rights of online platforms to promote the free exchange of ideas.¹⁸⁹ While finding the conduct at issue “horrific,” the judge ultimately dismissed the case in light of Section 230 of the CDA, noting that “it nonetheless is a matter Congress

179. *Id.* at 4 (citing Nat’l Ctr. for Missing & Exploited Children, *J.S. v. Vill. Voice Media Holdings, LLC*, No. 4492-02-II, at 3 (Wash. Super. Ct. Sept. 15, 2014); Testimony of Yiota G. Souras, Senior Vice President & General Counsel, NCMEC, before Permanent Subcommittee on Investigations, at 2 (Nov. 19, 2015)).

180. *Id.* at 1.

181. *See id.*

182. *Id.* at 6.

183. *Id.*

184. *See* Kristina Cooke & Dan Levine, *Child Sex Trafficking Victims Sue Backpage.com in Four States*, REUTERS (Jan. 25, 2017), <https://www.reuters.com/article/us-usa-internet-sexcrimes-idUSKBN1592MK> [<https://perma.cc/CS6K-ZX5A>] (describing civil litigation filed in Texas, Alabama, California, and Washington state that drew on a U.S. Senate Subcommittee Report released accusing Backpage of editing posts to remove evidence of child sex trafficking); *see also* SENATE REPORT, *supra* note 173.

185. Under the TVPRA of 2003, any individual who facilitates or financially benefits from human trafficking is subject to civil liability if the individual has knowledge or a reckless disregard for the fact that the victim in question was subject to force, fraud, coercion, or was a minor. 22 U.S.C. § 7101 (2018).

186. *M.A. v. Vill. Voice Media Holdings*, 809 F. Supp. 2d 1041, 1045 (E.D. Mo. 2011). In particular, the plaintiffs argued that Backpage was “responsible in part for the development and/or creation of information provided through the internet or other internet computer service.” *Id.* at 1044.

187. *Id.* at 1044–45.

188. *See id.* at 1058.

189. *Id.* at 1053 (describing the conflict between “facilitating growth of the Internet and preventing harm to individuals”).

has spoken on and is for Congress, not this Court, to revisit.”¹⁹⁰ The district court went on to foreshadow that “[t]he legislative resolution of these issues will, indirectly, shape the content of communication over the Internet.”¹⁹¹

Ultimately, the court was prescient.¹⁹² Civil litigators continued to bring lawsuits without success but sparking a greater public outcry, placing greater pressure on Congress to investigate Backpage and formulate a legislative response.¹⁹³ On January 10, 2017, a scathing report from the Senate Permanent Subcommittee on Investigations (“Senate Report”) found that Backpage knowingly facilitated child sex trafficking by actively editing ads involving child victims and engaging in affirmative conduct making it easier for perpetrators to evade detection.¹⁹⁴ According to the Senate Report, while Backpage reportedly monitored posts for child sex trafficking, it also engaged in practices to encourage and profit from child sex trafficking on the site.¹⁹⁵ This conduct included: (1) coaching users when posting ads until they successfully entered an appropriate age and “description”; (2) allowing users to pay and post anonymously while obscuring contact information; (3) stripping metadata from photos and removing advertisements posted by victim support organizations and the police; and (4) failing to use existing technology to identify child sex trafficking.¹⁹⁶

The Senate Report contributed to public momentum that led to the passage of the Allow States and Victims to Fight Online Sex Trafficking Act (“FOSTA”), introduced on April 3, 2017,¹⁹⁷ and passed by Congress on February 27, 2018, amidst considerable controversy.¹⁹⁸ Critics argued that amending Section 230

190. See *id.* at 1043, 1053.

191. *Id.* at 1053.

192. See *id.*

193. In 2013, forty-nine state attorneys general wrote to Congress demanding legislative action to amend Section 230. See Letter from Nat’l Ass’n of Attorneys Gen. to Congress to Amend § 230 of the CDA (July 23, 2013), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1465&context=historical> [<https://perma.cc/P98L-YEEY>]. Media attention intensified public awareness following a one-year investigative journalism piece on ABC News “Nightline” that focused on the role of Backpage in facilitating child sex trafficking. See, e.g., Gloria Riviera et al., *Woman Allegedly Trafficked Through Backpage.com Says New Legislation Brings ‘Closure,’* ABC NEWS (Apr. 11, 2018), <https://abcnews.go.com/US/woman-allegedly-trafficked-backpage-legislation-brings-closure/story?id=54390501> [<https://perma.cc/EA59-87JP>]. This dovetailed with the issuance of a moving documentary, *I am Jane Doe*, which told the stories of child victims of trafficking fighting Backpage for damages but who were prevented from recovery by Section 230 of the CDA. See I AM JANE DOE (50 Eggs Film 2017); see also Mary Mazzio, *Anti-Sex Trafficking Bill Gets Crushed Under Big Tech’s Lobbying*, THE HILL (Dec. 17, 2017), <https://thehill.com/opinion/civil-rights/365295-anti-online-sex-trafficking-bill-gets-crushed-under-big-techs-lobbying> [<https://perma.cc/3NNN-39AL>].

194. See SENATE REPORT, *supra* note 173.

195. See *id.*

196. See *Jane Doe v. Backpage.com*, No. 15–1724 (D. Mass. Mar. 14, 2016).

197. See Pub. L. No. 115–164, 132 Stat. 1253 (2018) (codified as 47 U.S.C. § 230 (2018)).

198. See *id.* (amending § 230 of the Communications Decency Act to clarify that immunity does not apply to website operators associated with sex trafficking). The Stop Enabling Sex Traffickers Act (“SESTA”) and Allow States and Victims to Fight Online Sex Trafficking Act (“FOSTA”) were the

would have tragic implications for the internet, free speech, and the safety of those involved in commercial sex.¹⁹⁹ In particular, critics asserted that the bill would drive commercial sex further underground and make it more difficult to screen buyers to promote safety.²⁰⁰ Additionally, digital rights groups, such as the Electronic Frontier Foundation, opposed FOSTA, arguing that it undermined free speech protections by overly burdening online platforms with monitoring duties that would lead to harmful censorship.²⁰¹

In FOSTA, Congress clarified that Section 230 of the CDA was “never intended to provide legal protection to websites . . . that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims.”²⁰² The legislation clearly established that companies are subject to federal civil liability if they are “knowingly assisting, supporting, or facilitating a [sex trafficking] violation” under 18 U.S.C. § 1591.²⁰³ In addition, FOSTA allows state attorneys general, as *parens patriae*, to file civil suits against corporations for sex trafficking on online platforms.²⁰⁴ Also, companies can face state criminal charges if their conduct violates existing state human trafficking statutes.²⁰⁵

U.S. Senate and House bills to amend the CDA to address sex trafficking. *See id.*; Stop Enabling Sex Traffickers Act (SESTA), S. 1693, 115 Cong. (2017). SESTA was incorporated into the House version of the bill entitled FOSTA, and the joint proposal was known as the “FOSTA-SESTA package.” This Article refers to the legislation passed as FOSTA, rather than FOSTA-SESTA, because the name of the legislation that passed was The Allow States and Victims to Fight Online Sex Trafficking Act.

199. *See, e.g.*, Emily Cochrane, *Senate Crackdown on Online Sex Trafficking Hits Opposition*, N.Y. TIMES (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/us/politics/senate-online-sex-trafficking.html> [<https://perma.cc/H2AG-MJPN>] (“[T]he bill is running into vigorous opposition from technology companies and digital rights groups alarmed at the potential infringement of online speech.”); Sara Ashley O’Brien, *Tech Advocates Want to Stop a New Stop Enabling Sex Traffickers Act. Here’s Why*, CNN: CNN TECH (Aug. 3, 2017), <http://money.cnn.com/2017/08/03/technology/business/bill-stop-sex-traffickers-act/index.html> [<https://perma.cc/4PK2-6ACQ>].

200. *See* Rose Conlon, *Sex Workers Say Anti-Trafficking Law Fuels Inequality*, MARKETPLACE (Apr. 30, 2019), <https://www.marketplace.org/2019/04/30/sex-workers-fosta-sesta-trafficking-law-inequality/> [<https://perma.cc/PMJ7-V3PJ>] (“By making it harder for sex workers to be their own bosses, the legislation has forced them onto the street and into relationships with pimps and escort agencies, where they’re more vulnerable to violence and coercion.”).

201. *See, e.g.*, Aaron Mackey & Elliot Harmon, *Congress Censors the Internet, But EFF Continues to Fight FOSTA: 2018 in Review*, ELECTRONIC FRONTIER FOUND. (Dec. 29, 2018), <https://www.eff.org/deeplinks/2018/12/congress-censors-internet-eff-continues-fight-fosta-2018-review> [<https://perma.cc/5UWD-PKB3>] (describing efforts by the Electronic Frontier Foundation to oppose the FOSTA legislation and, once passed, to challenge the law, unsuccessfully, as unconstitutional).

202. The Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA), Pub. L. No. 115-164, § 2, 132 Stat. 1253 (2018) (codified as 47 U.S.C. § 230 (2018)).

203. *See id.* at § 5.

204. *See id.* at § 6(a). “*Parens patriae*” is a Latin term, meaning “parent of the nation,” and referred initially to the king’s role as “father and protector of his people.” *See* George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant*, 25 DEPAUL L. REV. 895, 895 (1976). American case law has developed the concept of *parens patriae* to allow the state to bring certain suits “as a guardian of the well-being of its general populace and economy.” *Id.* at 895.

205. *See* FOSTA § 4(a).

FOSTA, therefore, represented a significant evolution in human trafficking law, as it definitively widened criminal and civil liability to online platforms that host third-party content. By increasing criminal and civil liability, the law not only exposes such companies to new and sweeping penalties, but it also affirmatively encourages companies to increase monitoring, update their terms and conditions, and create policies to combat sex trafficking.²⁰⁶ FOSTA also has potentially sweeping implications for sites that host commercial sex ads, such as Backpage, Reddit, and Craigslist, as well as other leading online platforms, such as Google, Skype, Facebook, and Instagram. Since FOSTA's passage, the federal government seized Backpage, and seven employees of Backpage, including co-founders Michael Lacey and James Larkin, were arrested and pleaded guilty to federal charges of money laundering and conspiracy to facilitate prostitution.²⁰⁷

FOSTA also leaves many questions unanswered. FOSTA does not apply to state civil actions, leaving plaintiffs barred by the CDA in state claims against online platforms.²⁰⁸ In addition, FOSTA has prompted some commercial sex ads

206. See, e.g., Samantha Cole, *Craigslist Just Nuked its Personal Ads Section Because of a Sex-Trafficking Bill*, VICE (Mar. 23, 2018) https://www.vice.com/en_us/article/wj75ab/craigslist-personal-ads-sesta-fosta [<https://perma.cc/XL6Z-Y4H6>] (describing how Craigslist announced that it would no longer host personal ads after passage of FOSTA); Holly McDede, *One Year in, a Federal Law to Curb Sex Trafficking Online Remains Controversial*, KALW (Apr. 11, 2019), <https://www.kalw.org/post/one-year-federal-law-curb-sex-trafficking-online-remains-controversial> [<https://perma.cc/4JJG-8MTD>] (confirming that "Reddit, Craigslist, and Skype changed the terms of their service to ban sex workers"); Elizabeth Schumacher & Deutsche Welle, *Sex Workers Leave Twitter for Switter after Controversial US Law*, USA TODAY (June 29, 2019), <https://www.usatoday.com/story/news/world/2018/06/29/fosta-sex-workers-leave-twitter-switter-after-us-law/744989002> [<https://perma.cc/NY5A-MS67>] (describing the rising use of the site Switter, an alternative to Twitter made in Australia, that allows individuals to post about commercial sex); see also Elizabeth Nolan Brown, *Judge Poised to Reject Suit by 90 'Jane Does' Who Say Salesforce Is Reasonable for Sex Trafficking*, REASON (Sept. 24, 2019), <https://reason.com/2019/09/24/judge-poised-to-reject-suit-by-90-jane-does-who-say-salesforce-is-responsible-for-sex-trafficking> [<https://perma.cc/QS2B-NRJW>]; Sara Salinas, *50 Women Sue Salesforce, Claiming It Helped Backpage in Sex Trafficking*, CNBC (Mar. 17, 2019), <https://www.cnbc.com/2019/03/27/lawsuit-claims-salesforce-worked-with-sex-trafficking-site-backpage.html> [<https://perma.cc/8ZE7-L8G3>] (quoting Annie McAdams, lead counsel for plaintiffs in a 2019 civil sex trafficking suit against an online platform, noting that "[i]t's simply not enough to say fighting human trafficking is important. Internal policies and procedures have to reflect that commitment").

207. See, e.g., Megan Hadley, *With Backpage Closed, Where Will the Sex Slave Trade Go?*, CRIME REPORT (Apr. 9, 2018), <https://thecrimereport.org/2018/04/09/with-backpage-com-closed-where-will-the-sex-slave-trade-go> [<https://perma.cc/9NCC-9LD9>]; Daniel Kreps, *Backpage CEO Pleads Guilty to Charges, Assists in Federal Investigation*, ROLLING STONE (Apr. 13, 2018), <https://www.rollingstone.com/culture/culture-news/backpage-ceo-pleads-guilty-to-charges-assists-in-federal-investigation-628638> [<https://perma.cc/6B28-F5TX>]; Emily Witt, *After the Closure of Backpage, Increasingly Vulnerable Sex Workers Are Demanding Their Rights*, NEW YORKER (June 8, 2018), <https://www.newyorker.com/news/dispatch/after-the-closure-of-backpage-increasingly-vulnerable-sex-workers-are-demanding-their-rights> [<https://perma.cc/L85J-UFZ8>].

208. See Brown, *supra* note 206 (describing a tentative state judge ruling on September 20, 2019, that the CDA effectively immunizes online platforms, including Salesforce, because FOSTA does not apply to private civil actions based on state law); EJ Dickson, *Dozens of Women Sue Salesforce for Allegedly Facilitating Sex Trafficking*, ROLLING STONE (Mar. 28, 2019), <https://www.rollingstone.com/culture/culture-news/salesforce-sued-sex-trafficking-814814>

to migrate onto overseas online platforms—a move that may allow platforms effectively to evade any burgeoning civil and criminal liability.²⁰⁹ By doing so, it also limits prosecutors’ ability to receive much-needed discovery from online platforms, which is often instrumental in securing trafficking convictions.

3. *Hotels and Motels That Knowingly Benefit from Trafficking*

Hotels are also facing increased civil suits for their role in sex trafficking.²¹⁰ In 2018, Lisa Haba, a victim-rights attorney in Florida, noted, “[a]nyone involved in fighting human trafficking will tell you hotels and motels are ground zero in the battle against this heinous crime.”²¹¹ In the past decade, a greater number of plaintiffs have brought suits against hotels, arguing that they “knowingly benefit[.]” from sex trafficking that occurs on their premises.²¹² While some hospitality chains have implemented training programs for employees to identify sex trafficking, advocates argue that such efforts are insufficient.²¹³

In 2017, the first federal civil suit against a hotel was filed in Massachusetts.²¹⁴ The plaintiff, Lisa Ricchio, alleged that Clark McLean

[<https://perma.cc/96Z7-74X8>] (describing lawsuit filed by fifty plaintiffs against Salesforce, an online customer management relationship provider, alleging that the company facilitated trafficking by providing services to Backpage).

209. See, e.g., Dan Whitcomb, *Report Gives Glimpse Into Murky World of U.S. Prostitution in Post-Backpage Era*, THOMPSON REUTERS (Apr. 11, 2019), <http://news.trust.org/item/20190411110959-s4dpl> [<https://perma.cc/NU9S-8DL2>] (quoting Anaheim Police Sergeant Juan Reveles of the Orange County Human Trafficking Task Force in Southern California, who noted that “Backpage’s closure represented a double-edged sword for law enforcement” and has been replaced with “the scattershot market of shadowy web sites, often incorporated overseas”).

210. See SHEA RHODES, VILLANOVA COM. SEXUAL EXPLOITATION INST., *SEX TRAFFICKING AND THE HOTEL INDUSTRY: CRIMINAL AND CIVIL LIABILITY FOR HOTELS AND THEIR EMPLOYEES* (2015), https://cseinstitute.org/wp-content/uploads/2015/06/Hotel_Policy_Paper-1.pdf [<https://perma.cc/74BK-RPUX>].

211. Kate Santich & Krista Torralva, *Advocates: ‘Special Interests’ Trying to Gut Human Trafficking Bill*, ORLANDO SENTINEL (Feb. 5, 2018), <https://www.orlandosentinel.com/news/os-human-trafficking-bill-hotels-exempt-20180205-story,amp.html> [<https://perma.cc/F46U-2KJ9>]. This Article uses the terms “hotel” and “motel” interchangeably.

212. See Meghan Poole, *Beyond Hospitality: Hotel Liability for Trafficking*, TRAFFICKING MATTERS, <https://www.traffickingmatters.com/beyond-hospitality-hotel-liability-for-trafficking> [<https://perma.cc/JRP5-CZ8E>].

213. See, e.g., Susan Hogan et al., *Lawsuits Accuse Hotels, Truck Stops of Turning Blind Eye to Sex Trafficking*, CHANNEL 4 (Apr. 30, 2018), <https://www.nbcwashington.com/news/local/lawsuits-accuse-hotels-truck-stops-of-turning-blind-eye-to-sex-trafficking/53563> [<https://perma.cc/5H7M-W83V>] (quoting attorney Annie McAdams as saying “The question [about hotels] then becomes, ‘What are you doing to stop human trafficking from occurring on your premise?’”); Poole, *supra* note 212 (“While some hotel chains have instituted trainings to identify human trafficking in their hotels, the hospitality industry as a whole is not doing enough to combat trafficking.”).

214. See *Ricchio v. McLean*, 853 F.3d 553 (1st Cir. 2017) (No. 1:15-cv-13519); see also Cory Sagduyu, *Nightmare in Shangri-La: Consequences Likely for Entities Who Benefit from Human Trafficking*, TRAFFICKING MATTERS, <https://www.traffickingmatters.com/nightmare-in-shangri-la-consequences-likely-for-entities-who-benefit-from-human-trafficking> [<https://perma.cc/9ZVU-ATX5>].

sexually assaulted her and then forced her to engage in commercial sex at a motel.²¹⁵ She further alleged that the motel owners ignored her impassioned pleas for help.²¹⁶ In her civil suit, Ms. Ricchio demanded compensatory and punitive damages against the motel owners, arguing that they knowingly benefited from the sex trafficking she experienced.²¹⁷

The plaintiff asserted that “the concept of benefit under the TVPA is exceptionally broad” and should extend to the motel in question.²¹⁸ The plaintiff noted in her brief that the TVPRA of 2008 allowed for secondary liability that “cuts a broad swath, and provides victims with a remedy against those who benefit from association with traffickers—even if they only ‘should have known’ that trafficking was taking place.”²¹⁹ However, the district court rejected this theory.²²⁰ Though the court found that the owners may have “turned a blind eye to Clark’s activities and Ricchio’s suffering,” it ultimately held that this did “not support the inference that the motel managers were in a trafficking venture.”²²¹

The First Circuit, with Justice David H. Souter sitting by designation, reversed.²²² Importantly, the court stated that individual incidents involving the hotel operator should not be read in “isolation,” and when the conduct is viewed in its totality, a hotel may be considered a “venture.”²²³ In particular, the court disagreed strikingly with the district court that “found it ‘meaningless’” when the perpetrator and hotel operator “exchanged high-fives in speaking about ‘getting this thing going again.’”²²⁴ Rather, the court found that such conduct is significant when read together with other facts, such as the hotel operator’s “complaisance” in response to “coercive and brutal behavior.”²²⁵ The case was remanded.

After one day at trial, the plaintiff in *Ricchio* secured a favorable civil settlement.²²⁶ The case also has been favorably cited in multiple jurisdictions and

(noting that “Shangri-La Motel and the Patels is the first civil suit that has been filed against a hotel under the TVPA’s civil-remedy provision”).

215. See *Ricchio*, 853 F.3d at 555.

216. See *id.*

217. See 18 U.S.C. § 1595(a) (2018).

218. See Plaintiff’s Memorandum in Opposition to Motion to Dismiss at 8, *Ricchio*, No. 1:15-cv-13519 (D. Mass. 2015) (arguing that “Section 1595(a) facially creates liability for any individual or entity that knowingly receives any benefit whatsoever”).

219. Plaintiff’s Brief at 6, *Ricchio*, No. 1:15-cv-13519 (D. Mass. 2015).

220. Order Granting Motion to Dismiss, *Ricchio*, No. 15-cv-13519 (D. Mass. Feb. 16, 2016).

221. *Id.*

222. *Ricchio*, 853 F.3d at 555 (reasoning that the defendants were aware of the plaintiff’s physical deterioration, had likely witnessed her assaults, and as a whole, likely “understood that in receiving money as rent for the quarters where [the trafficker] McLean was mistreating Ricchio, they were associating with him in an effort to force Ricchio to serve their business objective”).

223. *Id.* at 555–57.

224. See *id.* at 557.

225. See *id.*

226. See *id.* at 558; Docket, *Ricchio*, No. 1:15-cv-13519 (D. Mass. 2015); see also *WilmerHale Team Sets Standard for Liability in Human Trafficking Cases With Win for Victimized Client*, WILMERHALE (Dec. 13, 2019), <https://www.wilmerhale.com/en/insights/news/20191213-team-sets->

signals a broad interpretation of “venture” with significant implications for the trafficking field.²²⁷ Meanwhile, under state law, parallel legislative and litigation efforts have commenced, expanding civil liability for hotels. Texas and Pennsylvania have passed legislation allowing civil lawsuits to proceed against hotels that facilitate sex trafficking.²²⁸ As a result, state civil suits have already begun. In March 2017, a teenaged victim of sex trafficking filed suit under Pennsylvania state law, alleging that she was held at the Roosevelt Inn in Philadelphia starting at the age of fourteen and forced to engage in commercial sex for more than two years.²²⁹ Separately, in an unprecedented civil human trafficking suit under Texas law in 2018, the plaintiff named more than twenty defendants, including national hotel chains, such as Hyatt Hotels Corporation, and local hotels, such as the Palace Inn and Love’s Travel Stops and Country Stores.²³⁰ Thus, hotel litigation will likely continue with broad implications for third-party liability and the anti-trafficking field.

C. Taking Aim at Broader Conduct

The concept of sex trafficking has reached not only new actors but also a broader array of conduct. A cornerstone of U.S. federal legislation has been “force, fraud, or coercion,” but some states have now eliminated this requirement altogether, essentially conflating all commercial sex with sex trafficking.²³¹ Other states have broadened statutes to include more expansive prohibited means.²³²

standard-for-liability-in-human-trafficking-cases-with-win-for-victimized-client [https://perma.cc/E57M-XQXA] (“WilmerHale team concluded its precedent-setting representation of pro bono client Lisa Ricchio on December 3, securing a favorable settlement of her sex trafficking claim against a motel and its owners and managers under the Trafficking Victims Protection Act (TVPA).”).

227. See *Ricchio*, 853 F.3d at 556; see e.g., *Moulouki v. Epee*, 262 F. Supp. 3d 684, 698 (N.D. Ill. 2017) (citing to *Ricchio v. McLean* as persuasive authority that “providing lodging to someone for the purposes of obtaining her labor or services against her will” may be harboring under the TVPA).

228. See TEX. CIV. PRAC. & REM. CODE ANN. § 98.002 (West 2019); 18 PA. CONS. STAT. § 3051 (2019); see also Sebastian Malo, *Sex Trafficking Victim Sues U.S. Motel in Landmark Case*, REUTERS (Mar. 15, 2017), <https://www.reuters.com/article/usa-trafficking-lawsuit-idUSL2N1GS0TO> [https://perma.cc/HME2-6XH9] (describing first civil human trafficking suit under Pennsylvania state law against roadside motel); Samantha Schmidt, *Forced to Have Sex with 1,000 Men, a Girl is Now Suing the Motel that She Says Let It Happen*, WASH. POST (Mar. 14, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/03/14/forced-to-have-sex-with-1000-men-a-girl-is-now-suing-the-motel-that-she-says-let-it-happen> [https://perma.cc/F77TP-U6ME] (describing lawsuit filed by fourteen-year-old girl forced to engage in commercial sex with over 1,000 men in over two years).

229. Malo, *supra* note 228.

230. See Alvaro Ortiz, *Pioneering Lawsuit About Human Trafficking and Sexual Exploitation Filed In Houston*, HOUS. PUB. MEDIA (Jan. 24, 2018), <https://www.houstonpublicmedia.org/articles/news/2018/01/24/263612/pioneering-lawsuit-about-human-trafficking-and-sexual-exploitation-filed-in-houston> [https://perma.cc/WT68-B2ZG].

231. See Victims of Trafficking and Violence Protection Act of 2000 (TVPA), Pub. L. No. 106–386, § 102(2), 115 Stat. 1464 (2000) (codified at 18 U.S.C. §§ 1581–95 (2018)); *infra* Part II.C.1.

232. See *infra* Part II.C.1.

In addition to these efforts, some plaintiffs have reframed previously discrete gender-based crimes—such as domestic violence and sexual assault—as human trafficking to benefit from the generous civil remedy under the TVPA.²³³ For example, plaintiffs have filed civil claims arguing that “a single, gender-based sexual incident that was not connected to a sex trafficking scheme” may amount to sex trafficking when sex is exchanged for job advancement.²³⁴ Similarly, litigators have filed civil suits in domestic violence cases, reframing work in the context of an abusive relationship as forced labor or involuntary servitude.²³⁵ These cases, many of them pending as of this writing, will have significant implications for human trafficking law—as well as the field of gender-based violence writ large.²³⁶

1. Commercial Sexual Activity “By Any Means”

After the passage of the TVPA, advocates sought to strengthen state and local responses to human trafficking.²³⁷ In particular, the U.S. Department of Justice under President George W. Bush developed model anti-trafficking legislation—broader than the federal statute—that the U.S. Senate encouraged states to adopt.²³⁸ Federal funding to promote awareness and local enforcement efforts then trickled down to states and localities. Now, all fifty states have passed state human trafficking statutes.²³⁹

Although many states mirror the federal human trafficking statute requiring “force, fraud, or coercion” in cases involving adult victims, some states now depart from the statute significantly.²⁴⁰ Nine states have adopted unqualified “by any means” language or have eliminated the mention of “means” altogether in

233. See *id.*

234. See, e.g., *Noble v. Weinstein*, 335 F. Supp. 3d 504, 520 (S.D.N.Y. 2018) (involving a plaintiff seeking civil damages under the TVPRA who argued that a sexual assault amounted to a “commercial sex act” when the defendant promised to review her movie reel in exchange for sex).

235. See, e.g., HUMAN TRAFFICKING FACT SHEET, *supra* note 20, at 4 (citing Complaint, *Doe v. Faraghala*, No. 113-cv-238958 (Cal. Super. Ct. Jan. 14, 2013)).

236. See Dahlstrom, *supra* note 35 (examining the recent deployment of federal anti-trafficking law in domestic violence and sexual assault cases).

237. See Jennifer Chacón, *Human Trafficking, Immigration Regulation, and Subfederal Criminalization*, 20 NEW CRIM. L. REV. 96, 105 (2017).

238. See *id.* at 105 (citing Jennifer A. Kuhn & Alison L. Stankus, *Effective Implementation of the Trafficking of Persons and Involuntary Servitude Articles: Lessons from the Criminal Justice System Response to the Illinois Domestic Violence Act*, 28 N. ILL. U. L. REV. 215, 220–21 (2008)).

239. See TIP REPORT, *supra* note 51, at 486 (“All U.S. states and territories have anti-trafficking criminal statutes.”).

240. See ALA. CODE. 1975 § 13A-6-152 (2019); ALASKA STAT. ANN. § 11.66.120 (West 2019); ME. REV. STAT. ANN. tit. 17, § 853 (2019); MD. CODE ANN., CRIM. LAW §§ 3-1102 (2019); MASS. GEN. LAWS ch. 265, § 50(a) (2019); MINN. STAT. ANN. § 609.321 (West 2019); NEB. REV. STAT. § 28-830 (2019); TENN. CODE ANN. § 39-13-309 (West 2019); VA. CODE ANN. § 18.2-357.1 (2019). All states distinguish between sex trafficking involving adults and that involving children, according increased penalties to the latter. Some states provide lesser penalties to the sex trafficking crime defined broadly and more serious penalties to sex trafficking crimes involving prohibited means. See, e.g., ALA. CODE. 1975 § 13A-6-152; ALASKA STAT. ANN. § 11.66.120.

relation to a sex trafficking crime involving adults.²⁴¹ Minnesota, for example, defines sex trafficking as: “(1) receiving, recruiting, enticing, harboring, providing, or obtaining *by any means* an individual to aid in the prostitution of the individual; or (2) receiving profit or anything of value, knowing or having reason to know it is derived from an act described in clause (1).”²⁴² Similarly, in Massachusetts, the crime of trafficking in persons for sexual servitude involves: “[w]hoever knowingly . . . subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains *by any means*, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person to engage in commercial sexual activity.”²⁴³ Other state statutes, including Maryland and Virginia, make no mention of “means” at all in defining the sex trafficking crime.²⁴⁴

Several other states classify trafficking as either first-degree or second-degree trafficking, with second-degree crimes reserved for broader means. For example, in Alaska, sex trafficking in the second degree applies to a person who “manages, supervises, controls, or owns, either alone or in association with others, a prostitution enterprise other than a place of prostitution.”²⁴⁵ Similarly, in Alabama, first-degree trafficking requires “coercion or deception,”²⁴⁶ whereas “any means” is sufficient for second-degree trafficking.²⁴⁷ Other states distinguish in other ways, such as Maine, where an individual is guilty of sex trafficking who “knowingly promotes prostitution,” as distinguished from the crime of “aggravated sex trafficking.”²⁴⁸

Beyond this, other states have articulated a wider array of prohibited means beyond “force, fraud, or coercion.”²⁴⁹ For example, New York explicitly

241. See *supra* note 240.

242. MINN. STAT. ANN. § 609.321 (emphasis added).

243. MASS. GEN. LAWS ch. 265, § 50(a) (emphasis added).

244. Virginia’s statute, entitled Commercial Sex Trafficking, eliminates “means” altogether. See VA. CODE ANN. § 18.2-357.1(A) (criminalizing “[a]ny person who, with the intent to receive money or other valuable thing or to assist another in receiving money or other valuable thing from the earnings of a person from prostitution or unlawful sexual intercourse in violation of subsection A of § 18.2-346, solicits, invites, recruits, encourages, or otherwise causes or attempts to cause a person to violate subsection A of § 18.2-346 is guilty of a Class 5 felony”). In Maryland, the crime is called Pandering, but the statute notes that an individual is guilty of the misdemeanor of “human trafficking,” and the statute omits any mention of means. MD. CODE ANN., CRIM. LAW § 11-303(a)(1) (defining the crime as requiring the perpetrator to “(i) take or cause another to be taken to any place for prostitution; (ii) place, cause to be placed, or harbor another in any place for prostitution; (iii) persuade, induce, entice, or encourage another to be taken to or placed in any place for prostitution”).

245. ALASKA STAT. ANN. § 11.66.120.

246. ALA. CODE 1975 § 13A-6-152 (2019).

247. See *id.*

248. In Maine, an individual is guilty of sex trafficking if they “knowingly promote[] prostitution.” ME. REV. STAT. ANN. tit. 17-A, § 853 (2019). This crime is distinguished from aggravated sex trafficking under Maine law, which involves prohibited means or a minor. ME. REV. STAT. ANN. tit. 17, § 852.

249. See, e.g., N.J. STAT. ANN. § 2C:13-8 (West 2019); N.Y. PENAL LAW § 230.34 (McKinney 2019); WIS. STAT. ANN. § 940.302 (West 2019).

includes the provision of drugs “with intent to impair said person’s judgment” to establish sex trafficking.²⁵⁰ Wisconsin similarly includes a range of means, many of which mirror federal law, but some of which push the definition outwards.²⁵¹ For example, under Wisconsin law, falsifying or mutilating documents is a permissible means that can lead to a trafficking conviction.²⁵² Also, in many states, the knowing destruction, concealment, removal, or possession of an actual or purported government identification document is a sufficient means, absent any other coercive or violent conduct.²⁵³

Broad state sex trafficking statutes have provoked both controversy and constitutional challenges.²⁵⁴ For example, in 2011, Massachusetts became the forty-eighth state to pass human trafficking legislation, doing so with a notably expansive statute.²⁵⁵ Former Attorney General Martha Coakley, urging passage of the law, argued that “[o]ur bill sends a clear message that this brutal exploitation is unacceptable in Massachusetts and gives law enforcement the tools to address it.”²⁵⁶ Despite the rhetorical focus on “brutal exploitation,” the legislation criminalized a surprisingly broad array of conduct as sex trafficking, including almost all commercial sexual activity.²⁵⁷

This expansion has not gone unnoticed by defendants who have strenuously challenged the law’s application as unconstitutional.²⁵⁸ In *Commonwealth v. McGhee*, defendants before the Massachusetts Supreme Judicial Court made a host of arguments, asserting the sex trafficking statute was unconstitutionally

250. N.Y. PENAL LAW § 230.34.

251. WIS. STAT. ANN. § 940.302.

252. *See id.*

253. *See, e.g.*, ARK. CODE ANN. § 5-18-103 (West 2019); GA. CODE ANN. § 16-5-46 (2019); 720 ILL. COMP. STAT. 5/10-9 (2019); KAN. STAT. ANN. § 21-5426 (2019); MD. CODE ANN. CRIM. LAW § 11-303 (West 2019); MICH. COMP. LAWS SERV. § 750.462A (LexisNexis 2019); MISS. CODE ANN. § 97-3-54.1 (West 2019); N.H. REV. STAT. ANN. § 633:7 (2019); N.J. STAT. ANN. § 2C:13-8 (2019); N.Y. PENAL LAW § 230.34 (McKinney 2019); TENN. CODE ANN. § 39-13-309 (West 2019).

254. *See, e.g.*, *Commonwealth v. McGhee*, 35 N.E.3d 329 (Mass. 2015) (upholding the constitutionality of the crime of trafficking in persons for sexual servitude under Massachusetts law).

255. *See* An Act Relative to the Commercial Exploitation of People, 2011 Mass. Ch. 178, 2011 Mass. H.B. 3808 (2011); *see, e.g.*, Gerry Tuoti, *Inhuman Trade: Five Years Later, State Law Has Helped Address Human Trafficking*, METROWEST DAILY NEWS (Aug. 6, 2017), <https://www.metrowestdailynews.com/news/20170806/inhuman-trade-five-years-later-state-law-has-helped-address-human-trafficking> [<https://perma.cc/AG3W-M2L6>].

256. Press Release, Massachusetts Office of Attorney General, AG Coakley Urges Passage of Anti-Human Trafficking Legislation (May 18, 2011), <http://wayback.archive-it.org/1101/20180104143240/http://www.mass.gov/ago/news-and-updates/press-releases/2011/ag-urges-passage-of-anti-human-trafficking-leg.html> [<https://perma.cc/LJC8-AWWA>].

257. *See* MASS. GEN. LAWS ch. 265, § 50(a) (2019) (applying to “[w]hoever knowingly: (i) subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains *by any means*, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person to engage in commercial sexual activity”). The crime is named Trafficking in Persons for Sexual Servitude, but the term “sex trafficking” is used in this Article for simplicity.

258. *See, e.g.*, *McGhee*, 35 N.E.3d at 329–33 (challenging the constitutionality of the Massachusetts sex trafficking statute).

vague and overbroad.²⁵⁹ The defendants, Tyshaun McGhee and Sidney McGee, allegedly recruited two victims, sexually assaulted them, and forced them to engage in commercial sex.²⁶⁰ Although the conduct fit squarely within the accepted federal meaning of trafficking, the defendants argued that the Massachusetts statute remained unconstitutionally overbroad because it indiscriminately criminalized anyone knowingly involved in commercial sex.²⁶¹ According to the defendants' attorneys in oral arguments, the statute would criminalize the taxi driver who knowingly transports a "sex worker."²⁶² It similarly would criminalize the "Good Samaritan" who provides food to a victim of sex trafficking.²⁶³ For these reasons, the defendants argued that "[t]he real world application of Massachusetts's newly enacted 'human trafficking' statute is simply ambiguous, vague, and overbroad."²⁶⁴

The Massachusetts Supreme Judicial Court disagreed.²⁶⁵ The court upheld the expansive human trafficking crime, noting that it "reflect[s] a conscious decision by the Legislature to deviate from the standard embodied in the Federal statute."²⁶⁶ To that end, the court relied on the *mens rea* requirement as a fix-all for any overbreadth concerns.²⁶⁷ It wrote: "What the defendants characterize as 'merely assisting' an adult consenting prostitute will still constitute the crime of sex trafficking in those circumstances where *all* of the statutory elements have been satisfied. The absence of any element, notably *mens rea*, will negate criminality."²⁶⁸ Furthermore, the court noted that the Massachusetts legislature "has determined that whether a person being trafficked for sexual servitude has been forced or coerced into engaging in such activities is immaterial for purposes of ascertaining whether a criminal act has been committed."²⁶⁹

Since the decision in 2013, the Massachusetts Supreme Judicial Court and Appeals Court have upheld this broad formulation of trafficking.²⁷⁰ For example, the Supreme Judicial Court found in *Commonwealth v. Dabney* that "the Legislature also intended to 'change the focus of police and prosecutors from targeting prostitutes to going after the men who pay for sex with them and the pimps who profit from the transactions.'"²⁷¹ However, despite clarity at the Supreme Judicial Court and appellate level, defendants continue to raise the issue

259. *See id.* at 406–08.

260. *See id.* at 408–12.

261. *See id.* at 407.

262. Oral Argument, *McGhee*, 35 N.E.3d 329 (Mass. 2015) (No. SJC-11821).

263. *See id.*

264. Redacted Brief and Record Appendix for the Defendant on Appeal from a Judgment of the Superior Court of Suffolk County at 36, *McGhee*, 35 N.E.3d 329 (Mass. 2015) (No. SJC-11821).

265. *McGhee*, 35 N.E.3d at 341.

266. *Id.* at 338 n.8.

267. *See id.* at 340.

268. *Id.*

269. *Id.* at 339.

270. *See, e.g., Commonwealth v. Dabney*, 90 N.E.3d 750 (Mass. 2018).

271. *Id.* at 762.

in court pleadings, arguments for jury nullification, and appeals.²⁷² For example, in *Commonwealth v. Sonya Palic*, the defendant, accused of running an escort service called Chloe's Companions, argued in her motion to dismiss that the government did not provide evidence of "force, fraud, or coercion" sufficient to establish the sex trafficking charge.²⁷³ The Middlesex Superior Court denied the motion, noting the settled state precedent that "force, fraud, or coercion" is not required under Massachusetts law.²⁷⁴

2. Reframing "Commercial Sex Acts" to Include Domestic and Sexual Violence

In another display of trafficking's definitional elasticity, civil litigators have creatively reframed certain domestic violence and sexual assault crimes as "trafficking" to benefit from the TVPA's generous civil framework. In the context of sex trafficking, some of these efforts center on the meaning of a "commercial sex act." Federal law requires that a "commercial sex act" is induced through the "means of force, threats of force, fraud, or coercion," unless the victim is under eighteen years old.²⁷⁵ Arguably, many sexual and domestic violence cases involve physical violence or threats sufficient to establish these prohibited means. Thus, the central question becomes whether the sex act is "commercial."²⁷⁶

Federal law has defined "commercial sex act" with surprising breadth to include any sex act where "anything of value is given to or received by any person."²⁷⁷ Litigators thus have argued that this includes perpetrators who may use promises of advancement or influence to coerce or force sex.²⁷⁸ While courts have interpreted "anything of value" to include both tangible and intangible items of value, Congress failed to define the exact reach of "intangible," leaving

272. See, e.g., *Commonwealth v. Palic*, No. 1781-CR-00485 (Middlesex Super. Ct. 2017).

273. See Clerk's Notice at 1, *Palic*, No. 1781CR00485 (Middlesex Super. Ct. 2017) (denying the Motion to Dismiss the Indictments Alleging Trafficking of Persons for Sexual Servitude, and Conspiracy to Traffic a Person for Sexual Servitude "for reasons stated in the Commonwealth opposition") (citing *Dabney*, 90 N.E.3d at 762–64 (Mass. 2018); *Commonwealth v. Hernandez*, 102 N.E.3d 428 (Mass. App. Ct. 2018); *McGhee*, 35 N.E.3d at 336–40 (Mass. 2015)).

274. See *id.*

275. See *id.*

276. See *id.*

277. See 18 U.S.C. § 1591(e)(3) (2018). The terms "thing of value" or "anything of value" commonly appear in federal criminal law and mean both tangible and intangible remuneration.

278. See, e.g., *United States v. Townsend*, 630 F.3d 1003, 1010 (11th Cir. 2011) ("The four other courts of appeals that have addressed this issue have all held that intangibles can be things of value for this purpose."); *United States v. Marmolejo*, 89 F.3d 1185, 1191–93 (5th Cir. 1996) (holding that the plain meaning of 18 U.S.C. § 666(a)(1)(B) includes transactions involving intangibles within the term 'anything of value' and collecting cases construing 'anything of value' in other criminal statutes to include intangibles).

courts to interpret the reach, amidst broad statutory language and congressional intent.²⁷⁹

The most prominent recent example of this trend involves civil suits against Harvey Weinstein under the TVPA.²⁸⁰ In 2018, British actress Kadian Noble alleged that Weinstein sexually assaulted her in her hotel room in Cannes, France, in 2014.²⁸¹ Her lawyers argued that Weinstein's promise to review her movie reel in exchange for sex amounted to an exchange "of anything of value," sufficient to establish a "commercial sex act" under the TVPA.²⁸² However, Weinstein's attorneys fervently disagreed.²⁸³ Weinstein's attorneys contended that his conduct was "light years away" from sex trafficking and that construing it as sex trafficking was an "utter perversion of the legislative intent behind the statute."²⁸⁴ In particular, Weinstein's attorneys argued that Congress meant to "prevent slavery, involuntary servitude, and human trafficking for commercial gain," not "a single, gender-based sexual incident that was not connected to a sex trafficking scheme."²⁸⁵

In August 2018, Judge Robert Sweet denied Weinstein's motion to dismiss, allowing the sex trafficking lawsuit to proceed.²⁸⁶ The federal judge found that the term "commercial sex act" required a "liberal reading," given Congress's definition of commercial as involving "anything of value."²⁸⁷ Further, the court found that Weinstein's promises clearly involved something of value, noting that "[t]he contention, therefore, that Noble was given nothing of value—that the expectation of a film role, of a modeling meeting, of 'his people' being 'in touch

279. Since 2000, courts have found that the statutory language of § 1591 is broader than the purpose of eradicating international sex slavery. In *United States v. Townsend*, the Eleventh Circuit found that "[b]y its plain terms, § 1591(a) criminalizes trafficking in 'person[s],' not just in slaves or women from other countries." 521 Fed. Appx. 904, 906 (11th Cir. 2013). Also, the court in *United States v. Estrada-Tepal* noted that "expansiveness was a legislative goal in enacting the statute" and agreed with prosecutors that it "criminalizes a broad spectrum of conduct." 57 F. Supp. 3d 164, 169 (E.D.N.Y. 2014) (emphasis omitted).

280. *Loman v. Weinstein*, No. 2:18-cv-07310 (C.D. Cal. 2018); *Noble v. Weinstein*, No. 1:17-cv-09260 (S.D.N.Y. 2017).

281. Complaint at 1, *Noble*, No. 1:17-cv-09260.

282. *Id.* at 3–4.

283. See, e.g., *Judge Allows Sex-Trafficking Suit Against Weinstein*, *Citing History of the Casting Couch*, L.A. TIMES (Aug. 14, 2018), <https://www.latimes.com/business/la-fi-ct-weinstein-lawsuit-20180814-story.html> [<https://perma.cc/UZ64-9866>] [hereinafter *Judge*] (quoting Weinstein's attorney as arguing that his alleged conduct was "light years away" from the congressional intent when enacting anti-trafficking legislation to address those who "go[] after underage girls on the promise of a green card and lock[] them up in a basement and mak[e] them have sex with people"); Larry Neumeister, *Weinstein Lawyers Argue Against Sex Trafficking Claim*, ASSOCIATED PRESS (Jan. 29, 2019), <https://www.apnews.com/88bbfa0f850f41e3a6432045d3ca736f> [<https://perma.cc/M76H-JLKQ>].

284. See Neumeister, *supra* note 283.

285. Defendant's Memorandum in Opposition to Motion to Dismiss at 10, *Noble*, No. 1:17-cv-09260.

286. See *Judge*, *supra* note 283.

287. See Opinion at 30, *Noble*, No. 1:17-cv-09260.

with her' had no value—does not reflect modern reality.”²⁸⁸ Since the decision, at least two other federal judges have agreed with this interpretation.²⁸⁹

These claims are rooted in emerging federal criminal and civil case law that interpret the TVPA to apply to “intimate, domestic relationships.”²⁹⁰ *United States v. Marcus* provides the backbone of such arguments.²⁹¹ In *Marcus*, a district court judge in the Eastern District of New York held that the TVPA applies to “intimate, domestic relationships” in the context of a BDSM relationship.²⁹² In the past few years, litigators and prosecutors have brought greater civil and criminal cases involving victims of sexual assault, in part relying on *Marcus*. They argue that conduct, ranging from chronic sexual abuse by religious leaders to sex cults involving celebrities, amounts to sex trafficking under federal law.²⁹³ While many claims—including that against Weinstein—remain pending, their resolution will have dramatic implications for the human trafficking field.

III.

THE ELASTICITY OF TRAFFICKING: BENEFITS AND DANGERS

A. Push Factors at the Margins

Why are these trends gaining momentum? The first reason, and the one perhaps receiving the most scholarly attention, is that the definition of trafficking is deeply connected to longstanding debates about prostitution and trafficking.²⁹⁴ Neo-abolitionists, who view commercial sex as inherently harmful to women and generally support criminal legal efforts, have sought to eliminate the commercial sex industry through targeted interventions that criminalize perpetrators of trafficking, punish buyers of sex, and decriminalize those selling sex.²⁹⁵ Thus, they support a very broad framing of the crime.

288. See *id.*

289. See, e.g., *Canosa v. Ziff*, 2019 WL 498865, at *22 n.26 (S.D.N.Y. Jan. 28, 2019) (No. 18-cv-4115 (PAE)); *Huett v. Weinstein Co. LLC*, 2018 WL 6314159, at *3 (C.D. Cal. Nov. 5, 2018) (No. 2:18-cv-06012 (SVW)); *Geiss v. Weinstein Co. Holdings LLC*, No. 17 Civ. 9554 (AKH), 383 F. Supp. 3d 156, 2019 U.S. Dist. LEXIS 66364, 2019 WL 1746009, at *6 (S.D.N.Y. Apr. 17, 2019).

290. See *United States v. Marcus*, 487 F. Supp. 2d 289 (E.D.N.Y. 2007), *vacated on other grounds*, 538 F.3d 97 (2d Cir. 2008).

291. See *id.*

292. See *id.* BDSM in this context refers to consensual erotic practices or roleplaying, including bondage, discipline, dominance and submission, sadomasochism, and other dynamics.

293. See, e.g., *Bistline v. Jeffs*, 2017 U.S. Dist. LEXIS 4788 (D. Utah, Jan. 11, 2017) (involving a civil claim under the TVPA against Warren Jeffs, a religious leader who routinely sexually abused his “spiritual wives”); *United States v. Ranieri*, 2019 WL 1903365, at *22 (E.D.N.Y. 2019) (describing the criminal prosecution of Keith Rainiere, a criminal defendant accused of managing a sex cult wherein his “slaves” were responsible for engaging in sexual conduct with “masters” within the organization).

294. See *supra* note 45; see also Chuang, *Rescuing Trafficking*, *supra* note 13; Haynes, *supra* note 13.

295. See *supra* note 45.

In the United States, neo-abolitionists gained considerable prominence and power in the George W. Bush Administration, which advocated for criminal legal responses to trafficking and placed high priority on efforts that sought “‘to abolish prostitution’ writ large.”²⁹⁶ The Bush Administration then used its influence to require nongovernmental organizations abroad to adopt its anti-prostitution stance as a condition for U.S. funding and contracts.²⁹⁷

The U.S. government and a rising wave of private funders have funneled money into neo-abolitionist nonprofit organizations that advocated directly for an expansive definition and interpretation of trafficking.²⁹⁸ For example, considerable government funding went to Shared Hope, a nongovernmental agency that advocates for domestic child sex trafficking victims. In turn, Shared Hope directly engaged in research, legislation, and litigation efforts to expand the definition of trafficking to buyers of sex with children.²⁹⁹ Such efforts contributed in part to the passage of federal human trafficking legislation, such as the JVTA of 2015, which considerably expanded federal criminal jurisdiction to apply to certain buyers of sex.³⁰⁰

Lawyers have also played a significant role, if less well examined, in the evolving legal definition of trafficking.³⁰¹ Lawyers have pushed for expanded definitions of trafficking in instrumental, case-specific, and ends-driven ways. Both prosecutors and victim-rights attorneys have sought to expand the contours

296. See Chuang, *Rescuing Trafficking*, *supra* note 13, at 1666; see also Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: the Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 1 SIGNS: J. WOMEN CULTURE & SOC’Y 45, 51 (2010).

297. See Chuang, *Rescuing Trafficking*, *supra* note 13, at 1683–84.

298. See, e.g., Ruth Graham, *How Sex Trafficking Became a Christian Cause Célèbre*, SLATE (Mar. 5, 2015), <https://slate.com/human-interest/2015/03/christians-and-sex-trafficking-how-evangelicals-made-it-a-cause-celebre.html> [<https://perma.cc/AD73-A2RX>] (depicting the increasing involvement of evangelicals in fueling and funding the neo-abolitionist movement); Sue-Lynn Moses, *Funding the New Abolitionism: Who’s Giving to End Modern Day Slavery?*, INSIDE PHILANTHROPY (Mar. 3, 2016), <https://www.insidephilanthropy.com/home/2016/3/3/funding-the-new-abolitionism-whos-giving-to-end-modern-day-s.html> [<https://perma.cc/U6T4-F945>] (describing the development of organizations, such as Humanity United, Google, and the NoVo Foundation, that provide funding to the “new abolitionists”).

299. Congresswoman Linda Smith founded Shared Hope. Their staff attorneys have consistently advocated for neo-abolitionist perspectives, notably the criminalization of buyers of sex with children. See Melissa Gira Grant, *Fighting Sex Trafficking with Jesus: How the Religious Right’s “Healing” Hurts*, SALON (Apr. 27, 2014), https://www.salon.com/2014/04/27/fighting_sex_trafficking_with_jesus_how_the_religious_rights_healing_hurts [<https://perma.cc/B3U8-TK82>] (“Shared Hope’s director of programs Eliza Reock tells Salon the group was funded by both the State Department and the Department of Justice to produce reports on trafficking.”).

300. See, e.g., *Congress Passes Landmark Bill: Justice for Victims of Trafficking Act*, SHARED HOPE INT’L (May 19, 2015), <https://sharedhope.org/2015/05/19/congress-passes-landmark-bill-justice-for-victims-of-trafficking-act> [<https://perma.cc/PMK2-SQFU>].

301. Although this factor is often distinct from ideology, it is true that they are often interrelated. Attorneys from anti-trafficking organizations with a neo-abolitionist perspective may be more inclined to support legislation or represent clients in an effort to broaden the law’s application. In contrast, criminal defense attorneys may adopt the sex work position and, as a result, be more likely to support limited definitions of trafficking as well as the decriminalization or legalization of commercial sex.

of trafficking to overcome failures of victim protection and persistent problems of under-prosecution. This has resulted in an alliance between victim-rights attorneys and prosecutors that continues to push the trafficking definition outwards.

In the decade after Congress passed the TVPA, few human trafficking prosecutions moved forward relative to conservative estimates of the crime.³⁰² From 2000 to 2008, only half of the agencies that investigated human trafficking cases filed criminal charges against alleged perpetrators.³⁰³ Research identified several reasons for this disconnect.³⁰⁴ For example, a study from 2011 found that “[p]rosecutors in all jurisdictions overwhelmingly described victim reluctance to testify or lack of cooperation as the biggest challenge they faced prosecuting human trafficking cases.”³⁰⁵ In these jurisdictions, prosecutors often noted that “without a cooperating victim or, ideally, multiple cooperating victims, they would not proceed with a prosecution.”³⁰⁶ Victims in trafficking cases often failed to cooperate due to distrust of law enforcement, fear of reprisals, and lack of alternatives to leave the trafficking situation.³⁰⁷

In addition, research has found that prosecutors, amidst legal uncertainty, often charged other crimes instead of trafficking. One study noted this occurs when “the legal elements of the crime are more established and prosecutors believe there is a greater chance of a conviction” under other statutes.³⁰⁸ Prosecutors justified these decisions in part to “avoid uncertainty” because they seek only to “file criminal charges in those cases where they believe the chance of conviction is high.”³⁰⁹

302. See Amy Farrell et al., *Understanding and Improving Law Enforcement Responses to Human Trafficking: Final Report*, NE. U. INST. RACE & JUST. 7 (2008) [hereinafter FARRELL, FINAL REPORT], <https://www.ncjrs.gov/pdffiles1/nij/grants/222752.pdf> [<https://perma.cc/VEY4-KZEY>]. Of these, only 32 percent filed federal charges against the perpetrators with only 61 percent of those filing charges under the TVPA. See *id.*

303. See *id.*

304. See, e.g., AMY FARRELL ET AL., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTIONS OF STATE AND LOCAL HUMAN TRAFFICKING CASES (2012), <https://www.urban.org/sites/default/files/publication/25526/412593-Identifying-Challenges-to-Improve-the-Investigation-and-Prosecution-of-State-and-Local-Human-Trafficking-Cases.PDF> [<https://perma.cc/KVX6-W68Y>] [hereinafter FARRELL, IDENTIFYING CHALLENGES].

305. See *id.* at 8; see also Alessandra P. Serano, *Evidence Considerations in Proving Sex Trafficking Cases without a Testifying Victim*, in *Human Trafficking*, 65 USA BULLETIN 120 (2017), <https://www.justice.gov/usao/page/file/1008856/download> [<https://perma.cc/FJ9Q-84EZ>].

306. See FARRELL, IDENTIFYING CHALLENGES, *supra* note 304, at 8; see also FARRELL, FINAL REPORT, *supra* note 302, at 83 (finding that 83 percent of law enforcement agencies in the study believed “victims do not cooperate due to fear of retaliation to themselves or their family as well as a lack of trust in the criminal justice system”).

307. See FARRELL, FINAL REPORT, *supra* note 302, at 76.

308. See FARRELL, IDENTIFYING CHALLENGES, *supra* note 304, at 10.

309. *Id.* at 14 (finding that in the case of new crimes, “uncertainty about the likelihood of a conviction is high and prosecutors are anticipated to be more cautious about proceeding with prosecutions”).

Expanding the human trafficking crime addresses myriad barriers. For example, eliminating requirements, such as “force, fraud, or coercion,” streamlines the criminal process³¹⁰ and makes the prosecution less dependent on victim testimony.³¹¹ Expanding the crime also makes it easier for prosecutors to bring cases successfully, make plea deals, and obtain guilty convictions. It limits the need for victim testimony and, thus, may reduce retraumatization of victims. Also, expansive criminal liability allows prosecutors to target a range of actors with serious criminal charges, making it more likely to secure cooperation from witnesses and, in turn, negotiate successful plea agreements and obtain guilty convictions.³¹²

In addition to prosecutors, many victim-rights attorneys have supported efforts to expand the definitional framework.³¹³ The TVPA allowed victims of “severe forms of trafficking” to reap immense, and often hard-won, benefits.³¹⁴ The TVPA, thus, has incentivized victim-rights attorneys to make creative arguments aimed at obtaining civil damages and victim benefits.³¹⁵ Broad interpretation of trafficking allows victims to obtain civil damages, immigration relief, criminal record relief, and criminal restitution.³¹⁶

This trend has intensified thanks to unprecedented civil litigation under the TVPA with more skilled, well-resourced litigators at the helm.³¹⁷ In 2012, the Human Trafficking Pro Bono Center (“Center”) in Washington D.C. was founded with the explicit goal of increasing *pro bono* civil litigation by victims

310. See, e.g., FARRELL, IDENTIFYING CHALLENGES, *supra* note 304, at 149 (quoting a prosecutor who did not have to prove “force, fraud, or coercion” to promote prostitution charges, and who noted: “I don’t have to show that she was scared. I don’t have to show that he beat her. All I have to do is show that this guy was either profiting from her or helping her in some way or encouraging it, and he is cooked.”).

311. See *id.* at 173 (“Prosecutors in every jurisdiction included in our study described victim reluctance to testify or lack of cooperation as the biggest challenge they face prosecuting human trafficking cases.”).

312. See *id.* at 113 (“One prosecutor indicated that as investigations progress it is important to have credible witnesses to corroborate the victim’s story.”).

313. For example, certain victim-rights advocates sought to pass the JVTA and FOSTA, federal legislation to expand the reach of trafficking jurisdiction. See, e.g., Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, VOX (July 2, 2018), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom> [<https://perma.cc/7HV9-G8T7>] (describing FOSTA as “hailed by advocates as a victory for sex trafficking victims”); *Congress Passes Landmark Bill: Justice for Victims of Trafficking Act*, SHARED HOPE INT’L (May 19, 2015), <https://sharedhope.org/2015/05/19/congress-passes-landmark-bill-justice-for-victims-of-trafficking-act> [<https://perma.cc/5WWA-UV5B>] (noting that Shared Hope International, a national anti-trafficking organization focusing on domestic minor sex trafficking, “has actively supported the Justice for Victims of Trafficking Act since initially introduced in 2013”).

314. See *supra* Part 1.B for a discussion of benefits available to victims under federal law.

315. See *id.*

316. See *id.*

317. See generally HUMAN TRAFFICKING LEGAL CENTER, IMPACT REPORT (2018), http://www.htlegalcenter.org/wp-content/uploads/HT_Pro_Bono_Impact_Report.pdf [<https://perma.cc/8635-Z6FS>] [hereinafter IMPACT REPORT].

of trafficking.³¹⁸ As of August 2018, the Center has more than tripled the number of civil cases filed in the United States, trained more than 3,600 attorneys, placed more than 280 civil cases with *pro bono* counsel, and educated more than 18,000 community leaders on victims' legal rights.³¹⁹ As a result, the number of civil cases has grown significantly in the past fifteen years, with more than six times as many cases filed in 2017 than in 2004.³²⁰

An army of *pro bono* attorneys, many from large firms with extensive resources to fuel attempts of civil litigation, has reinforced these efforts.³²¹ The Center reports that “[i]n the majority of these [299 federal civil] cases, plaintiffs have been represented by *pro bono* counsel at law firms.”³²² This has resulted in more cases filed against third parties; the Center predicts that in the next fifteen years, “the number of sex trafficking civil cases will surge, as attorneys become more sophisticated in attacking third-party beneficiaries.”³²³

In a 2015 report about its impact, the Center notes that it is “redefining anti-trafficking” and highlights its efforts to involve “new players—human rights lawyers, international litigators, NGO partners, investigative journalists, and committed supporters—together to turn outrage into action.”³²⁴ Furthermore, the Center acknowledges that “[a]ttorneys representing trafficking survivors are developing ever more ambitious strategies to hold the traffickers accountable.”³²⁵ These efforts have successfully transformed the moral condemnation connected to human trafficking into tangible benefits for victims.

Lawyers have also invoked similar strategies in the immigration context, wherein they have creatively argued that victims of domestic and sexual violence may amount to victims of “severe forms of trafficking” under the TVPA and qualify for T visas.³²⁶ This is especially attractive when the processing times for T visas are more like nineteen months, as opposed to over five years for U visas for victims of violent crime.³²⁷

318. See generally HUMAN TRAFFICKING LEGAL CENTER, <https://www.htlegalcenter.org> [<https://perma.cc/LV5K-FC22>].

319. See *id.*

320. See LEVY, *supra* note 101, at 10.

321. See *id.*

322. See *id.*

323. See *id.* at 30.

324. See IMPACT REPORT, *supra* note 317, at 4.

325. See LEVY, *supra* note 101, at 30.

326. The Coalition Against Slavery and Trafficking, which received federal anti-trafficking funding to provide technical assistance to legal services providers, offers a two-part training series on Human Trafficking and Domestic Violence. *Training and Resources*, COAL. ABOLISH SLAVERY & TRAFFICKING, <https://www.castla.org/training-resources/training> [<https://perma.cc/P9Z3-RBWL>]. Such training not only addresses the overlap between these crimes but also includes detailed guidance about how to reframe gender-based violence claims as human trafficking. See *id.* Such training correctly tracks the broadening judicial interpretation in federal criminal and civil trafficking cases and seeks to encourage immigration practitioners to make similar arguments.

327. See *id.*

There are increasing advantages for immigration attorneys to turn to trafficking arguments.³²⁸ As Congress has limited discretionary relief from removal since 1996, victim-based remedies, such as the U and T visa, have become a critical lifeline for noncitizens. Against this backdrop, there are strong incentives for immigration attorneys to reframe certain crimes as trafficking to benefit from shorter processing times associated with T visa eligibility. For example, an attorney who represents a victim of sexual assault could apply for a U visa, which takes over five years to obtain. However, if she successfully reframes the conduct as trafficking, the same victim may receive a T visa in one to two years in addition to increased access to federal public benefits.³²⁹

Broadened state anti-trafficking statutes also expand U visa eligibility for victims of trafficking under state law. Because the state trafficking crime in Massachusetts does not require “force, fraud, or coercion,” a wide range of individuals now can qualify as “victims” for U visas. For example, in one of the first arrests under the Massachusetts human trafficking statute, defendants recruited undocumented women to work in “deplorable conditions” where they had to engage in commercial sex “up to 15 times a day.”³³⁰ And yet, because there was no evidence of “force, fraud, or coercion,” such victims would not qualify for T visas. Yet, because U visas can rely on state law, such victims are eligible for U visas, which opens up a new avenue for immigration status, employment authorization, and eventual lawful permanent residence.

B. Victories Through Expansion

Efforts to expand the trafficking definition have brought considerable success in some important respects.³³¹ In states with broader statutes, increased

328. The T visa often has considerable benefits that outweigh other comparable immigration protections, such as U visas for immigrant victims of crime. *See, e.g.*, KRISZTINA E. SZABO ET AL., NAT'L IMMIGRANT WOMEN'S ADVOC. PROJECT, COMPARISON CHART OF U VISA, T VISA, VIOLENCE AGAINST WOMEN ACT (VAWA) SELF-PETITION, SPECIAL IMMIGRANT JUVENILE STATUS (SIJS), AND DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) (2015), <http://niwaplibrary.wcl.american.edu/pubs/chart-vawa-t-u-sijs-daca> [<https://perma.cc/ET49-8H4J>]. T visas have quicker processing times, faster pathways to a green card, and improved access to federal public benefits. Additionally, as more immigration judges refuse to grant continuances based on pending U visas, attorneys have turned to T visas, which, with a processing time of a little over nineteen months, offer some hope of postponement. In addition, the U visa is available for state trafficking crimes. Therefore, as the trafficking definition has expanded in certain states, a wider array of victims in those states are now eligible for immigration relief. While U.S. Citizenship and Immigration Services does not release statistics for U visas categorized by state-level crimes, our office has represented victims of trafficking under Massachusetts law who have been granted U visas and who did not meet the more burdensome federal trafficking definition.

329. *See id.*

330. *Human Trafficking Investigation Uncovers Sophisticated Operation, Results in Numerous Arrests*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Mar. 23, 2012), <https://www.ice.gov/news/releases/human-trafficking-investigation-uncovers-sophisticated-operation-results-numerous> [<https://perma.cc/NSX2-DP93>].

331. Data on prosecutions and protections are difficult to gather due to differences in criminal data reporting and confidentiality provisions for victims, but initial data indicate that state and local

state trafficking prosecutions have resulted. Federally, such efforts have ignited prosecutions against new parties, such as certain buyers of sex, resulting in more convictions and heightened criminal penalties. In addition, victims have obtained large civil damages settlements and awards, and some undocumented victims have received much-needed immigration protections. These trends also have filled gaps in federal law, resulted in greater protections writ large for victims, and promoted greater awareness about trafficking as a crime. They also have potential expressive power in shaping emerging societal attitudes about sex trafficking and related conduct.

Broadening state statutes can bolster state and local anti-trafficking prosecutions. For example, in Massachusetts, where the definition of sex trafficking is quite expansive, the number of trafficking prosecutions increased dramatically after passage of state legislation.³³² From January 1, 2005, to December 31, 2011, the seven years before passage of state trafficking legislation, five federal sex trafficking prosecutions commenced involving eleven defendants in the District of Massachusetts.³³³ On the other hand, in the seven years after the passage of the broadened state trafficking law, Massachusetts state and local prosecutors charged at least 216 defendants with sex trafficking in at least 259 cases.³³⁴ In comparison, only eighteen cases involving twenty-seven defendants moved forward federally during the same time period.³³⁵ While laws such as those in Massachusetts remain works in progress, it is clear that broadened state statutes can play an important role in mobilizing prosecutions.³³⁶

Federally, as Congress has expanded the reach of the trafficking definition, prosecutors have increased criminal prosecutions against new parties. For example, prosecutions of buyers of sex increased significantly after Congress passed the JVTA of 2015, which amended federal law to treat certain buyers as perpetrators of sex trafficking.³³⁷ Federally, there has been an overall increase in

prosecutions may increase when state anti-trafficking statutes include definitions broader than the federal counterparts. *See supra* Part II.C.1.

332. *See, e.g., Massachusetts: 25 Charged in 4 Years With Human Trafficking*, WCVB (Apr. 7, 2016), <https://www.wcvb.com/article/massachusetts-25-charged-in-4-years-with-human-trafficking/8233577> [<https://perma.cc/9KYD-E8H2>].

333. *See* Chart of Federal Prosecutions Charged Under 18 U.S.C. § 1591 (2018) (on file with author).

334. *See* Philip Marcelo, *State Prosecutors Struggle With Human Trafficking Cases*, SEATTLE TIMES (May 26, 2019), <https://www.seattletimes.com/nation-world/nation/state-prosecutors-struggle-with-human-trafficking-cases> [<https://perma.cc/B4R7-JL4G>]. State-level data provided on file with the author from Philip Marcelo. The term “at least” is used because not all jurisdictions reported, so the data reported are the minimum number of defendants and cases for the time period. *See also* Chart of Federal Prosecutions Charged Under 18 U.S.C. § 1591, *supra* note 333.

335. *See supra* note 333.

336. More research is needed to evaluate the effectiveness of broadened trafficking statutes. Research should include measuring the number of arrests, prosecutions, and victim outcomes, and quantifying any potential collateral consequences.

337. *See supra* Part II.B.1.

buyer-defendants from 1.1 percent (one defendant) in 2008 to 11 percent (thirty-one defendants) in 2018.³³⁸ According to the Human Trafficking Institute, 2017 marked an 18.3 percent increase in the number of active federal cases involving buyer-defendants.³³⁹ That year, the U.S. Department of Justice charged 108 buyer-defendants in ninety-seven cases.³⁴⁰ In 2018, prosecutions proceeded at similar levels.³⁴¹

In addition, civil suits brought by victims have grown significantly against perpetrators and third parties. According to the Human Trafficking Legal Center, 299 civil trafficking cases commenced federally from the passage of the TVPRA of 2003, authorizing civil suits against third parties, until 2018.³⁴² The number of such cases continues to increase, with “more than six times as many cases filed in 2017 (thirty-seven) as in 2004 (six).”³⁴³ In 2018, there were ninety-one active civil cases, involving 390 defendants.³⁴⁴ This marked a slight increase from 2017 when there were eighty-nine active civil cases—twenty-nine new and sixty ongoing.³⁴⁵ Many cases have resulted in significant damages awards, with the highest single-verdict civil suit involving a victim of trafficking who was awarded nearly \$8 million in civil damages and restitution by a federal judge in Kansas in 2018.³⁴⁶

There also has been a steady increase of civil cases filed against third parties. In 2018, of the 390 defendants in active civil trafficking cases, 43.8 percent (171) involved third parties.³⁴⁷ This marked a slight increase from 2017, when 39.7 percent (181) of the active defendants were third parties. And, in turn, 2017 marked a slight increase from 2016, when 37.9 percent (183) of the active civil defendants were entity defendants.³⁴⁸

338. ALYSSA CURRIER & KYLEIGH FEEHS, HUMAN TRAFFICKING INST., 2018 FEDERAL HUMAN TRAFFICKING REPORT 19 (2019), <https://www.traffickingmatters.com/wp-content/uploads/2019/04/2018-Federal-Human-Trafficking-Report-Low-Res.pdf> [<https://perma.cc/JVQ7-3AQ9>] (“In 2018, 15.3% (ninety-nine) of active criminal sex trafficking cases involved a buyer-defendant, up slightly from 14.5% (ninety-nine) in 2017, but the government charged sixteen fewer buyer-defendants overall.”).

339. JOHN COTTON RICHMOND & KYLEIGH FEEHS, HUMAN TRAFFICKING INST., 2017 FEDERAL HUMAN TRAFFICKING REPORT 5 (2018), https://www.traffickingmatters.com/wp-content/uploads/2018/05/2017-Federal-Human-Trafficking-Report_hi-res.pdf [<https://perma.cc/6SDS-65NJ>].

340. *See id.*

341. *See* CURRIER & FEEHS, *supra* note 338, at 19.

342. *See* LEVY, *supra* note 101, at 10. This number does not include any civil suits dismissed as frivolous or cases consolidated soon after filing. *Id.* at 13 n.23.

343. *See id.* at 10.

344. *See* CURRIER & FEEHS, *supra* note 338, at viii, 50.

345. *See id.* at 50.

346. *See id.* at 25; Tom Jackman, *Human-Trafficking Victim, Forced to Work 10 Years for No Pay, Awarded \$8 Million by Federal Judge*, WASH. POST (May 30, 2018), <https://www.seattletimes.com/nation-world/human-trafficking-victim-forced-to-work-10-years-for-no-pay-awarded-8-million-by-federal-judge> [<https://perma.cc/U8D9-QZ77>].

347. *See* CURRIER & FEEHS, *supra* note 338, at 55.

348. *See* RICHMOND & FEEHS, *supra* note 339, at 53–54.

Moreover, a wider range of victims has become eligible for protections. More noncitizens are eligible for T and U visas based on broadened definitions of trafficking.³⁴⁹ Victims also qualify for other new protections, including public benefits, criminal restitution, vacatur of criminal convictions, civil damages, and victim compensation. For example, the widened definition of the sex trafficking crime in Massachusetts triggered greater eligibility to victim compensation—a program that covers medical and other costs related to the crime—and criminal restitution.³⁵⁰ It also created a state civil remedy with broad contours, allowing victims to file civil claims involving diverse conduct. Also, Massachusetts law expanded post-conviction relief, extending it potentially to almost anyone involved in commercial sex.³⁵¹

C. The Underbelly of Elasticity

Amid such victories, there are new, significant challenges presented by the burgeoning trafficking framework. The challenges include diffuse concerns that are difficult to measure but nevertheless important. In particular, as the expanding trafficking definition increases criminal penalties applicable to a wide range of actors and conduct, it risks disproportionate penalties for individuals with lesser roles in trafficking. In some instances, it extends criminal liability for trafficking to its victims. This has potentially perverse implications, disincentivizing cooperation and potentially endangering the very victims it seeks to protect.

Moreover, the expanding definition risks sowing confusion among juries and various stakeholders, with the risk of undermining prosecutorial and protection efforts. As the trafficking definition expands, politicians and government officials can more easily use the trafficking label in unscrupulous ways to mobilize enforcement efforts in immigration and other settings with negative impacts on victims. Lastly, but perhaps most importantly, as we move further away from a shared, succinct understanding of the trafficking crime, its expressive value is diluted.

1. Disproportionate Penalties for Trafficking Victims and Other Actors

As prosecutors mobilize trafficking crimes against a broader range of conduct and actors, they also subject new parties to heightened criminal penalties. In the past, this has been precisely the goal of anti-trafficking legislation—to increase criminal penalties to address perceived under-

349. Federal law limits the ability of U.S. Citizenship and Immigration Services to release identifying information of applicants for T and U visas to other government agencies, unless such applications are denied. *See* 8 U.S.C. § 1367(a)(2) (2018). In part due to such confidentiality protections, it is hard to document grant rates in particular cases. *See id.*

350. *See supra* note 32.

351. *See supra* note 33.

criminalization.³⁵² However, this process has also ignited criticism about disproportionate penalties.³⁵³ Within the past two decades, scholars have recognized that criminal legal interventions, while well-intentioned, can also have considerable negative consequences, fueling mass incarceration and disparately impacting historically underrepresented groups, which are more likely to be targeted for arrest and prosecution.³⁵⁴ These concerns are particularly acute in the human trafficking context because the crime triggers federal jurisdiction and particularly high mandatory minimum sentences.³⁵⁵ A defendant who is convicted of sex trafficking under federal law is subject to a mandatory minimum sentence of fifteen years in prison without parole and could receive up to life in prison under the TVPA.³⁵⁶ Also, federal trafficking statutes retain very harsh conditions at sentencing, including registration as a sex offender, which has dramatic and life-altering impacts.³⁵⁷

352. Chacón, *Misery and Myopia*, *supra* note 28, at 2993 (“The remainder of the Act increases penalties for certain acts that were already criminalized.”). This trend tracks with American public attitudes supporting punitive solutions to complex social problems. *See* NAZGOL GHANDNOOSH, SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES 6 (2014), <https://www.sentencingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies> [<https://perma.cc/ZN4R-H2ZN>].

353. Generally, punitive policies that criminalize certain conduct and increase mandatory minimum sentences have disproportionate impacts on certain historically underrepresented groups, and this too is a concern. *See, e.g.*, GHANDNOOSH, *supra* note 352, at 6 (“A widespread consequence of racial perceptions of crime is the overrepresentation of people of color in prisons, jails, and under community supervision.”).

354. Leigh Goodmark, *Should Domestic Violence be Decriminalized*, HARV. J.L. & GENDER 53, 54–55 (2017) (“This concentration on expanding the criminal legal response resulted from a number of factors, including the historical failure of the criminal legal system to respond to allegations of domestic violence, the belief that domestic violence was a public problem requiring a state response, and an increasing tendency to address all social problems by ‘governing through crime.’”).

355. *See, e.g.*, Abigail Swenstein & Kate Mogulescu, *Resisting the Carceral: The Need to Align Anti-Trafficking Efforts with Movements for Criminal Justice Reform*, ANTI-TRAFFICKING REV. (2016), <https://www.antitraffickingreview.org/index.php/atjournal/article/view/175/178> [<https://perma.cc/5756-ES3M>] (“In many instances, the prosecution-based model reveals itself as antithetical to principles of human and civil rights, ignores the reality that many trafficking survivors confront, and redirects the conversation away from important critique and reform.”). A defendant who is convicted of sex trafficking under federal law is subject to a mandatory minimum sentence of fifteen years in prison without parole and could receive up to life in prison under the TVPA. 18 U.S.C. § 1591(b)(1) (2018). If the defendant is convicted of trafficking a minor between the ages of fourteen and eighteen without force, fraud, or coercion, the mandatory minimum sentence reduces to ten years without parole, and it remains possible to be sentenced to life in prison. *Id.* § 1591(b)(2). *See, e.g.*, Sarah Crocker, *Stripping Agency from Top to Bottom: The Need for a Sentencing Guideline Safety Valve for Bottoms Prosecuted Under the Federal Sex Trafficking Statute*, 11 NW. U. L. REV. 753, 765 (2017) (“[T]he statutes’ base offense levels combined with the typical enhancements that accompany sex trafficking convictions often put defendants into Guidelines ranges well above the mandatory minimums.”).

356. 18 U.S.C. § 1591(b)(1); *see, e.g.*, Crocker, *supra* note 355. (“[T]he statutes’ base offense levels combined with the typical enhancements that accompany sex trafficking convictions often put defendants into Guidelines ranges well above the mandatory minimums.”).

357. *See, e.g.*, Judgment at 11, 12, *United States v. Grandoit*, No. 1:13-cr-10077-DJC (D. Mass. May 13, 2015) (sentencing a victim of human trafficking accused of transporting a minor victim of sex trafficking to one year and one day in prison and five years of supervised release and imposing

Even in state-level prosecutions, the stakes are high. For example, under the Massachusetts statute for sex trafficking, there is a mandatory minimum penalty of five years in state prison. This sentencing structure may apply equally to a surprisingly broad range of actors, including: (1) a taxi driver who knowingly transports an individual to engage in commercial sex;³⁵⁸ (2) a young adult who recruits a friend to engage in commercial sex; and (3) a mother who provides a place to live to her daughter knowing that she is engaged in commercial sex.

By enacting the TVPA of 2000, Congress determined that perpetrators of trafficking deserve increased penalties due to the severe harm to victims.³⁵⁹ However, as the gulf widens between conduct and penalty, and as collateral parties and new conduct are caught in the crosshairs, concerns about proportionality will only intensify.

2. *Unintended Consequences for Trafficking Victims*

The broadening trafficking framework, in certain contexts, can have dangerous consequences for victims.³⁶⁰ Although the broadening framework may bestow benefits to new individuals, now deemed “victims,” those benefits come at the cost of expanded criminal liability for victims and increased risks to victim safety.³⁶¹ These concerns are not new.³⁶² From the passage of the TVPA in 2000, scholars have noted that the federal focus on prosecution has exposed victims to potential arrest, detention, and immigration enforcement.³⁶³ However, scholars focused almost exclusively on so-called “bottoms”—victims of

conditions, including registry as a sex offender, participation in a “sexual specific evaluation or sex offender specific treatment,” and the inability to freely “possess or use a computer, internet-capable device, or similar electronic device or have access to any online service”).

358. See MASS. GEN. LAWS ch. 265, § 50(a) (2019); Oral Argument, *Commonwealth v. McGhee*, 35 N.E.3d 329 (Mass. 2015) (No. SJC-11821) (including arguments from the Commonwealth of Massachusetts that a taxi driver who knowingly transports a victim for commercial sex may be convicted of trafficking in persons for sexual servitude).

359. Stephen C. Parker & Jonathan T. Skrametti, *Pimps Down: A Prosecutorial Perspective on Domestic Sex Trafficking*, 43 U. MEM. L. REV. 1013, 1031 (2013).

360. It also may have unintended collateral consequences on other parties. For example, some argue that increasing civil and criminal liability for online platforms may result in migration of such content to platforms overseas, which are more difficult to regulate and less responsive to law enforcement subpoenas for information in criminal trafficking investigations. See, e.g., Ryan Tarinelli, *Online Sex Ads Rebound, Months After Shutdown of Backpage*, U.S. NEWS & WORLD REP. (Nov. 29, 2018), <https://www.usnews.com/news/best-states/texas/articles/2018-11-28/online-sex-ads-rebound-months-after-shutdown-of-backpage> [<https://perma.cc/SPH2-5HRM>].

361. See *supra* Part II.C.1.

362. See, e.g., Crocker, *supra* note 355.

363. Sabrina Balamwala, *Trafficking in Narratives: Conceptualizing and Recasting Victims, Offenders, and Rescuers in the War on Human Trafficking*, 94 DENV. L. REV. 1, 12 (2016) (“Critics of the TVPA’s criminalization provisions point out that the emphasis on criminalization places trafficked individuals at the risk of arrest, prosecution, and deportation.”).

trafficking who recruit other victims and/or have other roles in managing the trafficking enterprise.³⁶⁴

The expansion of the trafficking definition makes it likely that more actors, beyond “bottoms,” will be caught in the crosshairs. In particular, state statutes that capture broad conduct, such as those that equate trafficking with almost any commercial sexual activity, expose victims to increased criminal liability. Defendants’ lawyers are beginning to take notice. When challenging the constitutionality of the broad Massachusetts sex trafficking statute, counsel dedicated considerable time in oral arguments to whether a victim could essentially “traffic herself” by “knowingly” transporting herself for the purpose of commercial sexual activity.³⁶⁵ While no such case has emerged, the Massachusetts Supreme Judicial Court, by upholding the “by any means” language, made clear that a victim *may* be prosecuted, as long as the conduct was done “knowingly.”

Broad statutes grant relatively untethered discretion to prosecutors. Thus, prosecutors may wield statutes as swords to compel cooperation by victims.³⁶⁶ This is not only morally troubling but may have dangerous implications for victims and their safety. A victim, when faced with a choice of cooperating with the government or facing a mandatory minimum sentence, may choose to cooperate, even if she will face dangerous reprisals from the perpetrator.³⁶⁷ In addition, savvy perpetrators of trafficking may use knowledge that victims will face heightened criminal liability to exploit them and drive the trade even further underground.

Moreover, as human trafficking is defined more broadly, politicians and law enforcement agencies can more easily use trafficking as a justification for overbroad enforcement efforts with tragic implications for victims and devastating collateral consequences for vulnerable immigrant communities, including, perversely, those vulnerable to trafficking. For example, in April 2018, President Trump set off much debate by saying that “human trafficking is

364. Crocker, *supra* note 355, at 775–77.

365. See Oral Argument, *Commonwealth v. McGhee*, 35 N.E.3d 329 (Mass. 2015) (No. SJC-11821) (including arguments from the Commonwealth of Massachusetts that a taxi driver who knowingly transports a victim for commercial sex may be convicted of trafficking in persons for sexual servitude).

366. Crocker, *supra* note 355, at 775–76 (Mar. 16, 2016) (“As the law stands today, prosecutors may use their discretion to charge bottoms with violating §§ 1591, 2422(b), and 2423(a), which has the dual effect of granting prosecutors tremendous leverage to make bottoms cooperate in exchange for a lesser sentence and cabin the judge’s sentencing discretion for bottoms who do go to trial, due to the mandatory minimum sentences.”) (citing Interview with Joseph Bugni, Supervisory Assoc., Fed. Def. Servs. of Wis., Inc.).

367. *Id.* at 778 (“Although using this leverage may result in convicting more traffickers, it also squeezes bottoms between a rock and a hard place: either they cooperate with the government and testify or face the same charges as the men who trafficked them—charges that carry ten- or fifteen-year mandatory minimums.”).

worse than it's ever been in the history of the world."³⁶⁸ And yet, he has used the rally cry of trafficking to justify broad enforcement efforts aimed at undocumented immigrants.³⁶⁹

For example, Attorney General Jeff Sessions's 2018 "zero tolerance" policy was aimed at criminals, including "traffickers," and targeted undocumented immigrants with criminal prosecution and family separation.³⁷⁰ But despite the policy's ostensible concern with trafficking, the policy did little to identify or punish perpetrators and instead wreaked havoc on immigrant families, many of whom were tragically separated, prosecuted, and targeted with deportation.³⁷¹ On other occasions, President Trump cited human trafficking "where they tie up women and they put duct tape on their mouths" to gain support for a border wall and immigration enforcement along the U.S.-Mexico border.³⁷² As the definition of trafficking broadens, it becomes more vulnerable to manipulation by government actors with potentially tragic implications.

368. Aaron Blake, *Trump Says Human Trafficking 'Is Worse Than It's Ever Been in the History of the World.' Where to Begin?*, WASH. POST (Apr. 19, 2018), <https://beta.washingtonpost.com/news/the-fix/wp/2018/04/19/trump-says-human-trafficking-is-worse-than-its-ever-been-in-the-history-of-the-world-where-to-even-begin> [<https://perma.cc/D5KR-HW5F>]. The use of trafficking as a sword to mobilize increased immigration enforcement efforts is not new. For example, in 2010, in Maricopa County, Arizona, Sheriff Joe Arpaio posted signs asking for public support to "[h]elp Sheriff Joe Arpaio fight illegal immigration and trafficking" by providing tips to the Sheriff's Office about undocumented immigrants. See Jennifer Chacón, *Tensions and Tradeoffs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1649–50 n. 166 (2010) (citing Terry Carter, *The Maricopa County Courthouse War*, A.B.A. J. 42, 46–47 (2010)).

369. See Julie Dahlstrom, *Trump's Harsh Immigration Policies are a Gift for Human Traffickers*, THE HILL (July 12, 2018), <https://thehill.com/opinion/civil-rights/396781-trumps-harsh-immigration-policies-are-a-gift-for-human-traffickers> [<https://perma.cc/7PQT-9WH7>].

370. See, e.g., *Attorney General Sessions Addresses Recent Criticisms of Zero Tolerance By Church Leaders*, U.S. DEP'T OF JUSTICE (June 14, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-addresses-recent-criticisms-zero-tolerance-church-leaders> [<https://perma.cc/FTP2-A7BN>] (noting in his defense of the zero-tolerance policy that "[i]n many cases, children are trafficked, abused, or recruited by criminal gangs"); *Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry*, U.S. DEP'T OF JUSTICE (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> [<https://perma.cc/QW7T-5SRE>]; Julia Preston, *Zero Tolerance Lives On*, MARSHALL PROJECT (Sept. 14, 2018), <https://www.themarshallproject.org/2018/09/14/zero-tolerance-lives-on> (describing how the Attorney General "order[ed] . . . to file charges for the misdemeanor crime of "improper entry" against every migrant referred by the Border Patrol").

371. The United States Trafficking in Persons Report highlighted the fact that children separated from parents and placed in institutional care may be at greater risk for trafficking. See Susannah George, *US Trafficking Report Highlights Vulnerability of Children*, ASSOCIATED PRESS (June 28, 2018), <https://www.apnews.com/225575b5e8cd4c82aa6adb3829eeb550> [<https://perma.cc/5GQU-5Z62>].

372. See Katie Mettier, *Trump Again Mentioned Taped-Up Women at the Border. Experts Don't Know What He Is Talking About*, WASH. POST (Jan. 25, 2019), <https://www.washingtonpost.com/politics/2019/01/17/trumps-stories-taped-up-women-smuggled-into-us-are-divorced-reality-experts-say> [<https://perma.cc/N56C-NEAQ>] (listing repeated mentions of trafficking and women tied up with duct tape during key congressional meetings and briefings about immigration enforcement and related issues).

3. *Divergence Between Popular Understandings and the Legal Definition*

The expansion also risks creating cognitive dissonance as new understandings of trafficking diverge from more limited historical conceptions.³⁷³ Criminal prosecutions and civil suits brought pursuant to broader definitions may be less successful if judges and juries are not convinced that the case at hand is, indeed, human trafficking. In Massachusetts, criminal defendants continue to challenge the lack of evidence of “force, fraud, or coercion,” despite clear precedent that this is neither an element of the crime nor a defense.³⁷⁴ As a result, prosecutors often still need victims to testify about “force, fraud, or coercion” and educate both the judge and the jury in order to secure a conviction, even though this is not an element of the state trafficking crime.³⁷⁵

In addition, as the definition broadens, defendants may continue to raise a host of constitutional concerns about the overbreadth and vagueness of the statutes. These challenges may become more frequent as the definition expands, and they highlight real concerns about due process and freedom of association. Expansion risks criminalizing a wide range of actors, including a mother, friend, or social service provider, who knowingly associates with victims and other individuals involved in commercial sex. Even if such broad statutes are upheld by courts, definitional expansion will pose problems for the legitimacy and the conceptual viability of human trafficking.

IV.

THE NEXT WAVE: RECOMMENDATIONS

For the past twenty years, the fight to combat trafficking has centered on erecting a stable definitional framework. These efforts have been largely successful. There is now a robust legal infrastructure on the international, federal, and state levels. In these contexts, the trafficking definition has proved both viable and elastic. It has prompted action in new directions against more complex, subtle harms. There have been considerable benefits to this elasticity, as it has allowed the concept to evolve in response to changes in technology and societal conceptions of the problem.

However, the next wave of human trafficking reform will involve new and still more complex challenges. Legislators will confront how to update and revise

373. *See supra* Part I.A.

374. *See, e.g.*, *Commonwealth v. Palic*, No. 1781-CR-00485 (Middlesex Super. Ct. 2017) (court pleadings on file with author) (showing that the defendant continued to raise the lack of “force, fraud, or coercion” throughout the prosecution despite the absence of this requirement in state human trafficking law).

375. *See id.* Historically, in trafficking prosecutions, it has been difficult to secure convictions without victim testimony. *See, e.g.*, EVIDENTIAL ISSUES IN TRAFFICKING IN PERSONS CASES, UNODC 6 (2017), https://www.unodc.org/documents/human-trafficking/2017/Case_Digest_Evidential_Issues_in_Trafficking.pdf [https://perma.cc/9K68-GQJW] (“Juries may also be more reluctant to convict in cases where victims do not testify, even if the relevant law allows this.”).

existing trafficking statutes. Prosecutors will grapple with how to apply expanding trafficking models. Defense attorneys will raise new challenges on behalf of defendants who may genuinely be shocked to be called perpetrators of human trafficking. Finally, judges will consider whether a particular definition or application has strayed too far. Well-defined principles must govern these adjustments. These principles should be granular and contextual. They must consider the benefits and harms to diverse parties as well as the need to abide by constitutional norms.

A. *Guidance by Core Concepts*

Efforts at trafficking reform should remain connected to the core concepts that motivated early definitional efforts. The TVPA established new definitions of sex and labor trafficking. The TVPA definition of sex trafficking, while contentious, established “force, fraud, or coercion” at its center—in part to distinguish it from then existing federal law, such as the Mann Act, and to erect heightened criminal penalties and victim protections.

It is true that there have been persistent challenges to proving “force, fraud, or coercion” in the civil and criminal contexts.³⁷⁶ States, therefore, may find it tempting to remove the elements of “force, fraud, or coercion” or broaden the prohibited means to improve prosecutorial outcomes and enhance victim protections. But the possible consequences of such changes are quite dramatic, as they may dilute the expressive value of trafficking and risk sowing confusion among juries, judges, and others.

Similarly, in the TVPA, Congress also defined the term “commercial sex act” broadly to include a sex act in exchange of anything of value.³⁷⁷ However, it is unlikely that Congress intended for this to be interpreted so broadly to extend to almost any sex act, including a single act of sexual assault conduct.³⁷⁸ An overly broad interpretation of “commercial sex act” would radically expand the scope of sex trafficking to include many state gender-based crimes, such as child sexual abuse and sexual assault. Such a development, while it may allow some victims to receive much-deserved protections, also risks stymying localized efforts at sexual assault and domestic violence reform. Moreover, it opens up the TVPA to further constitutional challenges as defendants will argue that Congress has overreached its power under the Commerce Clause.³⁷⁹

376. See *supra* Part III.A.

377. See *supra* Part II.C.2.

378. Adam Klasfeld, *Weinstein Painted as Tuxedo-Clad Pimp for Sex-Trafficking Case*, COURTHOUSE NEWS SERV. (May 2, 2018), <https://www.courthousenews.com/weinstein-painted-as-tuxedo-clad-pimp-for-sex-trafficking-case> [https://perma.cc/S237-PMFQ] (quoting Harvey Weinstein’s counsel, Phyllis Kupferstein, who argued that “[i]t cannot be the case that every time a woman has sex with a more powerful man in an effort to advance her career, and it doesn’t go the way that she likes, that she somehow becomes a sex-trafficking victim”).

379. Harvey Weinstein has argued in a pending federal civil claim under the TVPA that interpreting the TVPA to apply to a single sexual assault, unconnected to a sex trafficking enterprise,

B. Balance the Interests at Stake

Future attempts to expand trafficking definitions should involve contextual balancing of the costs and benefits to parties. Legislators should examine how any broadening may impact fundamental societal values, such as privacy, due process, and first amendment rights. In addition, legislators should consider collateral consequences of broadened enforcement efforts on historically underrepresented groups and immigrant communities, who often are disparately impacted.³⁸⁰

In particular, future legislation should ensure that defendants have clear notice of the prohibited conduct. Legislation should not be so overbroad as to create civil or criminal penalties for innocuous behavior. At a bare minimum, such laws must include a *mens rea* requirement, requiring evidence that the defendant “knowingly” engaged in or benefited from sex trafficking.³⁸¹ Additionally, any criminal penalties must be proportionate. Thus, if broadening the criminal code to include sex trafficking “by any means,” legislators must accord decreased criminal penalties for more peripheral conduct and eliminate mandatory minimum penalties.

C. Third-Party Liability

Much of the definitional elasticity of trafficking involves application of the concept to third parties, and this trend should be commended. Congress, by extending civil liability to third parties in 2008, sought to ensure that third parties that knowingly benefit from trafficking are held civilly liable.³⁸² These changes are important. In other settings like sexual harassment, sexual assault, and sexual discrimination, third-party liability is well-established and plays an important role to encourage preventative behavior by individuals and corporations.³⁸³ The anti-trafficking space should be no exception. Thus, it is appropriate for third parties to be subject to civil penalties. However, the standard for civil liability of

would render the statute unconstitutional, as Congress lacks the authority to regulate such expansive, non-economic activity. See Defendant’s Memorandum in Opposition to Motion to Dismiss at 11, *Noble v. Weinstein*, 335 F. Supp. 3d 504 (S.D.N.Y. 2018) (No. 1:17-cv-09260). He points to *United States v. Morrison*, wherein the Supreme Court invalidated the civil remedy under the Violence Against Women Act because Congress lacked the authority under the Commerce Clause to legislate non-economic activity. See *id.* (citing *United States v. Morrison*, 529 U.S. 598, 613 (2000)).

380. See, e.g., Nelson Butler, *supra* note 120; Vanessa Bouché & Mark Daku, *Who is Disproportionately More Likely to be Prosecuted for Human Trafficking? Young Black Men*, WASH. POST (Jan. 11, 2019), <https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/11/young-black-men-are-disproportionately-likely-to-be-prosecuted-for-human-trafficking-this-explains-why/> [<https://perma.cc/XLU6-MNVX>].

381. See, e.g., *Commonwealth v. McGhee*, 35 N.E.3d 329, 421–22 (Mass. 2015) (relying on the *mens rea* requirement to uphold constitutionality of broad sex trafficking statute); Leary, *Dear John*, *supra* note 128, at 445–50 (proposing graduated *mens rea* sentencing approach).

382. See *supra* Part I.B.

383. See, e.g., Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655, 661–69 (2012) (describing third-party liability for sexual harassment in workplaces, schools, homes, and prisons).

third parties should be narrowly tailored. If third-party liability becomes too broadly defined or interpreted, this too may present challenges.

CONCLUSION

Expansion of the trafficking definition in some contexts has positive features. It marshals new energy and focus against a broad array of criminal conduct that previously fell through definitional cracks. It provides remedies for serious civil and criminal violations. These benefits are important. However, in certain contexts, this elasticity also poses challenges. As the trafficking definition moves away from its core focus, it risks losing its moral imperative, and with it, considerable power. Therefore, future choices to expand civil and criminal liability must be made sparingly. As the definition drifts further from its core, the trafficking concept will become more subject to attack, undermining hard-won progress and imperiling future anti-trafficking reform.